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Supreme Court, U.S.
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No. 91-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PAUL DELO, Superintendent,
Potosi Correctional Center,

Petitioner,

vs.

KENNETH L. KENLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

WHETHER AN ATTORNEY CAN BE FOUND TO HAVE RENDERED CONSTITUTIONALLY DEFICIENT ASSISTANCE TO A CRIMINAL DEFENDANT UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION WHERE (1) COUNSEL MADE A REASONABLE INVESTIGATION OF RESPONDENT'S SOCIAL HISTORY AND MADE A REASONABLE DECISION TO INVESTIGATE NO FURTHER AND (2) INFORMATION ABOUT RESPONDENT'S SOCIAL HISTORY IS SO INSUBSTANTIAL THAT THERE IS NO REASONABLE PROBABILITY THAT THE OUTCOME OF THE PENALTY PHASE WOULD HAVE BEEN DIFFERENT HAD THIS INFORMATION BEEN PRESENTED.

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OPINIONS BELOW

The panel Opinion of the United States Court of Appeals ordering the vacation of respondent's death sentence is reported at 937 F.2d 1298 (8th Cir. 1991) (A-1). The Judgment and Order of the district court is not reported, but is included in the Appendix (A-51).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its Opinion on May 17, 1991 (A-1). The Petition for Rehearing or Rehearing En Banc was denied by the court on August 13, 1991 (A-204). Pursuant to 28 U.S.C. § 2201(c) and Supreme Court Rule 13.1, the present Petition for a Writ of Certiorari was required to be filed by petitioner[1] within ninety days. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district

---

[1]Petitioner Paul Delo is respondent's current custodian following respondent's transfer from the Missouri State Penitentiary to the Potosi Correctional Center. Under 28 U.S.C. §2254, Rule 2(a), Fed.R.App.P. 23 and Supreme Court Rule 35.3, Paul Delo is the proper petitioner before this Court. Supreme Court Rule 14.1(b).

> wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent was convicted of capital murder, § 565.001, RSMo 1978 (repealed October 1, 1984), for which he was sentenced to death by the Circuit Court of Butler County, Missouri. The circumstances surrounding respondent's crime were

summarized by the Missouri Supreme Court on direct appeal.

> On January 1, 1984, Defendant came to the home where he was residing with a large number of handguns. He kept one of these, a silver .38 caliber pistol. The next day he purchased some .38 hollow point ammunition and with a friend practiced with the pistol by shooting at cans and trees. On January 3 at approximately 11:00 p.m. Defendant borrowed a brown Ford station wagon from his host and drove to the Kater Inn Package Store in Poplar Bluff. He entered the store with his pistol and threatened to kill the salesman unless the cash register money was given to him. The money was given to him. While this was transpiring a female customer, Sandra Buttry, entered the store and was ordered to lie on the floor. Upon completion of the robbery, Defendant grabbed Ms. Buttry's arm and forced her to leave with him. Once outside he pointed his pistol at Ms. Buttry's male companion, forced Ms. Buttry into the Ford station wagon and drove away. Upon Ms. Buttry's inquiry as to why he had taken her, Defendant stated he was "going to get a piece of ass." He then ordered Mrs. Buttry to perform fellatio on him. She opened the car door and jumped out of the car but was shot in the back by Defendant as she exited the car. As she was receiving assistance by a passing motorist Defendant drove back to where she was and then proceeded to the South. Ms. Buttry's wound was not fatal.

Approximately half an hour later Defendant entered the Blue Moon Tavern in Poplar Bluff and announced to the eight persons inside, "This is a holdup. Everyone hit the floor." When the people in the tavern did not immediately respond, Defendant stated, "I said this is a holdup. Hit the floor. I mean business and I'll make an example out of you." He then aimed his pistol at Ronald Felts, one of four people standing near a pool table, and from a distance of approximately 10 feet shot Felts through the temple. Felts died virtually instantaneously. With the occupants on the floor Defendant ordered the tavern owner, Ms. White, to open the cash register. He then proceeded to the back of the bar to collect the money and while there fired a shot over the heads of Ms. White and the bartender, Randy Jenkins. After collecting the money he ordered White and Jenkins to leave with him, but when they reached the end of the bar Defendant ordered Jenkins to the floor and shot him in the jaw. Jenkins recovered from the wound. Defendant then stated to White, "Bitch, you're going with me. You're going to give me head." In attempting to leave Defendant got the Ford station wagon stuck on the curb, so he and Ms. White returned to the tavern to get her keys. There he threatened to kill a fifteen year old girl if she had called the police, stating that he had already killed once and would do it again. Defendant and Ms. White then entered her vehicle. Defendant fired a shot at a bystander and the automobile left with Ms. White driving. Through a ruse she

> managed to open the car door, jumped out and ran back toward the tavern. Defendant got control of the car and drove on.
>
> In less than half an hour Defendant entered the Coachlight Motel in Poplar Bluff and after robbing the proprietor at gunpoint ordered her to leave with him. Her husband, who had been sleeping, entered the room and Defendant stated, "I'll kill you. I've killed already tonight and I'll kill you." A struggle between Defendant and the husband ensued which resulted in Defendant being pushed out the door. During their struggle the pistol held by Defendant pointed at the husband "clicked" but did not fire. Sometime later that morning Defendant entered Junior's Food Mart in Corning, Arkansas, and, after firing a shot into the ceiling, demanded a car and driver. He stated, "I've done killed once tonight. Wouldn't bother me to do it again." Somebody in the store pointed out his own car and told Defendant the keys were in it. Defendant drove away in that car and was arrested as he left the parking lot.

State v. Kenley, 693 S.W.2d 79, 80-81 (Mo. banc 1985), cert. denied, 475 U.S. 1098 (1986). After hearing this evidence, the jury found respondent guilty of capital murder. In a separate penalty phase of the trial, the jury found the existence of two statutory aggravating

circumstances: (1) that the murder was committed for purposes of receiving money, and (2) that by his act of murdering Felts, he knowingly created a great risk of death of more than one person in a public place. The jury assessed capital punishment as respondent's penalty. The Missouri Supreme Court upheld the conviction and sentence on direct appeal. Id. At a separate trial, respondent was convicted of three counts of first degree robbery, two counts of kidnapping, two counts of first degree assault and one count of stealing, for which he received seven consecutive life sentences and a consecutive seven years term. That judgment was also upheld on direct appeal. **State v. Kenley**, 701 S.W.2d 185 (Mo.App., S.D. 1985).

Respondent then sought post-conviction relief pursuant to Missouri Supreme Court Rule 27.26 (repealed 1-1-88). Respondent alleged, inter alia, that he received ineffective assistance of trial counsel at the penalty phase of his murder trial. After an evidentiary hearing,

the circuit court entered findings of fact and conclusions of law (A-137). The circuit court concluded that respondent did not receive ineffective assistance of trial counsel at the penalty phase. Respondent appealed the denial of relief to the Missouri Court of Appeals. After briefing by the parties, the appellate court affirmed the denial of post-conviction relief in an extensive opinion. **Kenley v. State**, 759 S.W.2d 340 (Mo.App., S.D. 1988) (A-145).

Respondent then filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Missouri (A-206). After amendment of the petition (A219) and responsive pleadings, the district court ordered the writ denied on July 12, 1988 (A-57). Respondent's motion to alter or amend the judgment was denied on November 22, 1988 (A-118). The district court granted a certificate of probable cause to appellant (A-120).

Respondent appealed to the United States Court of Appeals for the Eighth Circuit. The appellate court found respondent received effective assistance of counsel at the guilt phase of the capital murder trial and at the noncapital murder trial. The court of appeals, however, found that respondent received ineffective assistance of trial counsel at the penalty phase and ordered the capital sentence vacated. **Kenley v. Armontrout**, 937 F.2d 1298, 1309-1310 (8th Cir. 1991) (A-1). Petitioner's petition for rehearing or rehearing en banc was denied on August 13, 1991 (A-204). The present petition for writ of certiorari ensues.

ARGUMENT

I.

AN ATTORNEY CANNOT BE FOUND TO HAVE RENDERED CONSTITUTIONALLY DEFICIENT ASSISTANCE TO A CRIMINAL DEFENDANT UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION WHERE (1) COUNSEL MADE A REASONABLE INVESTIGATION OF RESPONDENT'S SOCIAL HISTORY AND MADE A REASONABLE DECISION TO INVESTIGATE NO FURTHER AND (2) INFORMATION ABOUT RESPONDENT'S SOCIAL HISTORY IS SO INSUBSTANTIAL THAT THERE IS NO REASONABLE PROBABILITY THAT THE OUTCOME OF THE PENALTY PHASE WOULD HAVE BEEN DIFFERENT HAD THIS INFORMATION BEEN PRESENTED.

To justify a grant of a writ of certiorari, petitioner must show a conflict between the lower-court opinion and opinions from other circuits, state high courts, or this Court. Alternatively, petitioner must show an important question of federal law which has not been, but should be, settled by this Court. Supreme Court Rule 10.1(a), (c). Additionally, there are

situations in which this Court utilizes the discretionary writ of certiorari as a deterrent to misconduct by courts of appeals in the form of erroneous decisions. See, e.g., **Burden v. Zant**, ___ U.S. ___, 111 S.Ct. 862, 112 L.Ed.2d 962 (1991) (presumption of correctness); **Sumner v. Mata**, 455 U.S. 591 (1982) (presumption of correctness); **Duckworth v. Serrano**, 454 U.S. 1 (1981) (exhaustion).

This Court has stated that the primary purpose of the writ of habeas corpus under 28 U.S.C. § 2254 is to serve as a deterrent to state-court misconduct in the resolution of federal constitutional challenges to custody. **Teague v. Lane**, 489 U.S. 288, 306 (1989). Likewise, one of the functions of this Court's discretionary writ, the writ of certiorari, should be to deter misconduct by the federal courts of appeals as manifested by their erroneous resolution of issues.

The present case represents an opportunity for this Court to correct the error of the

United States Court of Appeals for the Eighth Circuit in its resolution of respondent's claim that he received ineffective assistance of trial counsel at the penalty phase of his capital-murder trial. The claim considered by the court of appeals was extensively considered by the Missouri Court of Appeals during the appeal of the denial of state post-conviction relief. See **Kenley v. State**, 759 S.W.2d 340 (Mo.App., S.D. 1988) (A-145). The state appellate court extensively reviewed respondent's claim of ineffective assistance of trial counsel at the penalty phase. See id. at 344-48. The state court concluded that respondent did not receive ineffective assistance of counsel. Id. at 348.

Since respondent has had a full and fair hearing before the state tribunals, he failed to demonstrate any legitimate reason for issuance of a writ of habeas corpus. The federal appellate court failed to identify any misconduct by the state courts in considering respondent's allegations of ineffective assistance of

counsel. Mere disagreement by the federal court with the state court's resolution of a constitutional issue should be an insufficient basis upon which to grant a writ of habeas corpus. Because it did not find any misconduct by the state courts, the court of appeals failed to articulate how the rationale underlying the Great Writ, deterrence of state-court misconduct, is furthered by the granting of the writ of habeas corpus in the present case. See **Teague v. Lane**, supra. This omission by the appellate court, in and of itself, is sufficient to warrant this Court's issuance of a writ of certiorari.

In **Strickland v. Washington**, 466 U.S. 668, 689 (1984), this Court warned against reviewing counsel's conduct with the distorting effect of hindsight. To avoid hindsight, a reviewing court must indulge in a strong presumption that counsel's conduct was reasonable. See id. This is not merely sage advice to reviewing courts; rather, it is the law announced from this Court.

Did the court of appeals follow this standard? No. The United States Court of Appeals for the Eighth Circuit declined to enforce these **Strickland** principles with a claim that trial counsel is ineffective from the failure to investigate. See **Kenley v. Armontrout**, 937 F.2d 1298, 1304 (8th Cir. 1991). "[We] have held that counsel must exercise reasonable diligence to produce exculpatory evidence[,] and strategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel." Id. at 1304. This is contrary to this Court's teaching in **Strickland** where this Court stated: "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, 466

U.S. at 691. The court of appeals, however, fails to presume that counsel makes a reasonable decision that makes particular investigations unnecessary. **Kenley v. Armontrout**, supra. There is no articulated rationale to support the court of appeals' ruling. There is no support for the court of appeals' action in the law of **Strickland** or its progeny.

Is deterrence by way of a writ of certiorari necessary? Yes. The court of appeals' failure to presume the reasonableness of counsel's pre-trial investigation and his decision not to investigate further has been the subject matter of pre- and post-**Strickland** litigation before the court of appeals. See **Kenley v. Armontrout**, 937 F.2d at 1304, citing **Eldridge v. Atkins**, 665 F.2d 228 (8th Cir. 1981), cert. denied, 456 U.S. 910 (1982); **Chambers v. Armontrout**, 907 F.2d 825 (8th Cir.) (en banc), cert. denied, 111 S.Ct. 369 (1990); **Thomas v. Lockhart**, 738 F.2d 304 (8th Cir. 1984); **Pickens v. Lockhart**, 714 F.2d 1455 (8th Cir. 1983). In

Chambers v. Armontrout, supra; **Lawrence v. Armontrout**, 900 F.2d 127, 129-130 (8th Cir. 1990); **Kenley v. Armontrout**, supra; and **Henderson v. Lockhart**, 926 F.2d 706, 711 (8th Cir. 1991), the reviewing court engaged in de novo review to determine whether trial counsel's actions were reasonable. Rather, the appropriate review would be to presume the reasonableness of trial counsel's actions and then examine the record to determine if the evidence overcomes the strong presumption of reasonableness. Given the erroneous pattern of review by the lower federal court, the grant of certiorari in this case is necessary.

As the lower court found, trial counsel received records from Mrs. Crownover, respondent's former social worker. After receiving these records, trial counsel requested and received a psychiatric examination of respondent at the Fulton State Hospital. After receiving the report from Dr. Parwatiker, an examining psychiatrist, trial counsel discussed the report

with a nonexamining physician. **Kenley v. Armontrout**, 937 F.2d at 1300, 1306. These actions by trial counsel confirm the presumption that he acted reasonably in his pre-trial investigation. These actions are hardly the foundation of an ineffective-assistance-of-counsel claim. See **Kenley v. State**, 759 S.W.2d at 345-46.

The court below also failed to engage in proper **Strickland** prejudice analysis. The court failed to identify what information it perceived to be mitigating and to entitle respondent to relief. **Kenley v. Armontrout**, 937 F.2d at 1309. "Reasonable counsel might have been somewhat selective in his evidence presentation, but would not have cast aside all the mitigating evidence in this case." Id. The evidence from which the court of appeals found **Strickland** prejudice remained a secret. See id.

Do the various findings of antisocial personality disorder entitle respondent to relief? Respondent's witness, Dr. Manion described this

as "unsocialized behavior disorder." **Kenley v. Armontrout**, 937 F.2d at 1305. Dr. Parwatikar described it as "antisocial personality disorder." Such information is not mitigating but, indeed, is actually aggravating. See **Penry v. Lynaugh**, 109 S.Ct. 2934, 2949 (1989) (describing defendant's mental retardation a two-edged sword); **Laws v. Armontrout**, 863 F.2d 1377, 1389 (8th Cir. 1988) (en banc), cert. denied, 490 U.S. 1040 (1989); **Otey v. Grammer**, 869 F.2d 1137 (8th Cir. 1989) (Heaney, Sr. J., dissenting from denial of petition for rehearing en banc) (ineffective to adduce evidence of sexual sociopathy).

The panel opinion also referred to respondent's electroencephalogram (EEG). **Kenley v. Armontrout**, 937 F.2d at 1305. Respondent's evidence described the 1975 EEG reading as relating to psychopathy--hardly an endearing characteristic. An EEG reading from two years later was normal. Dr. Parwatikar's EEG testing of respondent was also normal.

The panel also appears to find mitigation from respondent's military records--in particular, from a "suicide gesture." **Kenley v. Armontrout**, 937 F.2d at 1306. There is more to the story than what the court of appeals says. Respondent's own military records indicated that, medically speaking, respondent was capable of returning to military duty. There was no thought disorder or psychosis, and the suicidal thoughts were resolved. The EEG was normal. The doctors first discovered that respondent's "suicidal gesture" came on the first or second day of his basic training. Respondent decided that he would not cope with the Army; thus, the "suicidal gesture" occurred. No true suicidal thoughts or intent was involved. The military papers stated:

> Within his first week of contact with the Army, he has decided he cannot conform to the requirements of military life. He sustained a self-inflicted cut on his left wrist in a successful attempt to get out of training. It would probably be in the best interest of the service if he

were eliminated as expeditiously as possible.

The military doctors indicated that respondent was capable of distinguishing right from wrong and adhering to the right. He was responsible for his actions. Why did the court of appeals not discuss all of the information provided by respondent?

The court of appeals also appears to believe that evidence of respondent's intoxication would have been mitigating. **Kenley v. Armontrout**, 937 F.2d at 1307. There was no objective evidence to support this assertion. Of course, in respondent's affidavit before the district court, respondent made no allegation that he had been drinking before or during his crime spree. Indeed, in 1984, he told Dr. Parwatikar that he was not under the influence of any drugs or alcohol when the alleged crime occurred and that he was in complete control of himself.

Finally, the court of appeals put great weight upon affidavits from respondent's family members. An item that is not discussed by the court of appeals is the aggravating information that the family members possessed. As an example, petitioner notes that the affidavit of respondent's grandmother did not discuss respondent's assault upon the grandmother with a rock--an item of information that was presented to the district court in the presentence investigation that was ordered by the state circuit court. Presumably, the grandmother could describe the size of the rock, how many times respondent hit her with the rock, how much pain respondent produced and the emotions the grandmother felt about being hit by a rock. The grandmother could also describe respondent's threats to kill another boy when respondent was the age of fifteen, an item of information omitted by the grandmother from her affidavit, but included in the presentence investigation.

An item that received little attention from the court of appeals is the aggravating aspect of much of the alleged mitigating information. Petitioner has discussed respondent's assault upon his grandmother with a rock and his escape from military service by a "suicidal gesture." Further, the panel did not discuss the aggravating information that Crownover and Manion possessed such as respondent's assault upon a young girl on the school bus, his engagement in shoplifting, or his disruption of a ward at the Farmington State Hospital.

While respondent was being evaluated by Dr. Parwatikar at the Fulton State Hospital, an event occurred that the panel described as "one violent incident during Kenley's incarceration." **Kenley v. Armontrout**, 937 F.2d at 1306. That statement is correct, but as with most euphemisms, it is incomplete. Dr. Parwatikar reported that respondent stated:

> This guy constantly started bugging me, coming in front of me while I was watching television, rocking my chair

> when I told him not to do it, so I just went ahead and choked him.

Dr. Parwatikar stated that respondent went on to say that he was angry with the hospital staff because the staff restrained him rather than the person that "bugged" respondent.

Why is petitioner relating these anecdotes to this Court? Petitioner believes strongly that respondent failed to demonstrate a reasonable probability that but for the mental-health information, the outcome of the trial would have been different. See **Strickland v. Washington**, 466 U.S. at 694-695. Respondent committed a two-state crime spree on the evening of January 3 and 4, 1984. What the court of appeals found to be mitigating evidence is, when considered in context, not very mitigating and subject to rebuttal by the State in its portion of the penalty stage. Indeed, as the above examples demonstrate, much of the mitigating evidence is, in actuality, aggravating.

The court of appeals rationalized that the spree was so bad that additional aggravating evidence would have had little effect on the jury. **Kenley v. Armontrout**, 937 F.2d at 1309. That analysis is shallow. First, if the spree were that bad, then mitigating evidence would have had little effect upon sentencing. Second, the additional aggravating information would have effectively refuted any attempt to paint respondent as a wayward choirboy. Rather than have just a crime spree, the jury would have learned that violence was a way of life for which respondent felt no remorse. Under these circumstances, there is no reasonable probability that but for the lack of putative mitigating information, the outcome of the penalty phase would have been different.

Why should the writ of certiorari issue in this case? Petitioner believes that the writ should issue in order to show the United States Court of Appeals for the Eighth Circuit how to do proper **Strickland** prejudice analysis. Such

action by this Court will prevent the analysis of the panel opinion from adversely affecting other capital habeas litigation arising from Arkansas, Missouri and Nebraska.

CONCLUSION

WHEREFORE, for the reasons herein stated, petitioner prays the Court issue a writ of certiorari in this cause.

Respectively submitted,

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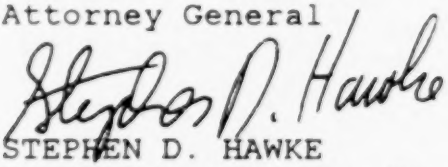

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SUPREME COURT OF THE UNITED STATES
October Term, 1991

PAUL DELO, Superintendent, Potosi Correctional Center, Petitioner, vs. KENNETH L. KENLEY, Respondent.	)	No. 91-_____

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 89-2915 and 90-1015

Kenneth L. Kenley,	*	
	*	
Appellant,	*	
	*	Appeals from the United
	*	States
v.	*	District for the
	*	Eastern District of
	*	Missouri
Bill Armontrout,	*	
	*	
Appellee.	*	

Submitted: October 8, 1990

Filed: May 17, 1991

Before **McMILLIAN**, Circuit Judge, **HENLEY**, Senior Circuit Judge, and **STUART**,* Senior District Judge.

HENLEY, Senior Circuit Judge.

Appellant, Kenneth L. Kenley (hereinafter "Kenley"), was convicted in separate trials of

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*The Honorable William C. Stuart, United States Senior District Judge for the Southern District of Iowa, sitting by designation.

capital murder and related noncapital offenses based on a spree of robberies that occurred on January 3 and 4, 1984. A summary of the crime facts appears in the opinion of the Missouri Supreme Court. State v. Kenley, 693 S.W.2d 79, 80-81 (Mo. 1985) (en banc). In sum, Kenley committed one murder, shot two bystanders, abducted two bystanders, stole two cars, committed several assaults, and robbed four businesses in just a few hours. Kenley was represented by appointed counsel. The two separate cases were based on essentially the same evidence, which included seven eyewitnesses to the murder and twenty-six total witnesses corroborating various aspects of Kenley's identity, his vehicles and his weapons. At the capital trial the jury found two aggravating circumstances, murder for value and the knowing creation of risk of death in a public place, and imposed the death sentence.

The capital appeal unsuccessfully alleged errors related to evidentiary issues, jury

procedures and violation of the eighth amendment. Kenley, 693 S.W.2d at 81-83. The noncapital appeal unsuccessfully alleged errors related to evidentiary issues and ineffective assistance of counsel. State v. Kenley, 702 S.W.2d 185 (Mo.App. 1985). Kenley then sought post-conviction relief from both the capital and noncapital sentences, received a hearing, but was denied relief by the Missouri Circuit Court (hereinafter "circuit court"). The claims were then reviewed by the Missouri Court of Appeals (hereinafter "appeals court") which affirmed the judgment of the circuit court. Kenley v. State, 759 S.W.2d 340 (Mo.App. 1988).

This appeal arises from the federal district court's (hereinafter "district court") denial of Kenley's petition for writ of habeas corpus. 28 U.S.C. Section 2254 (1990). The petition raises thirty-five grounds for relief as to the capital conviction and a dozen grounds for relief as to the noncapital convictions

(primarily claims of ineffective assistance of counsel).

Kenley argues, with respect to both the capital and noncapital claims, that the district court erred by: (1) finding no ineffective assistance of counsel during the guilt or sentencing phase of either trial, (2) finding many of Kenley's claims for relief procedurally barred, and (3) applying the presumption of correctness to state court findings too broadly. Because we believe Kenley received ineffective assistance of counsel during the sentencing phase of his capital trial, we reverse the judgment of the district court and remand this case to the district court with instructions that the State of Missouri resentence Kenley.

FACTS

The facts that follow represent a composite of the consistent findings made by the Missouri Courts and the district court, unless otherwise

stated. Appointed counsel was a new county public defender just three months out of law school with no trial experience. The trial occurred six months after appointment when counsel had one misdemeanor robbery trial under his belt. Counsel's time card from Butler County, Missouri indicates he spent roughly fifty hours in pre-trial preparation for Kenley's capital trial.

Counsel sought and received little outside assistance in preparing his case. Kenley's former social worker, Mrs. Crownover, initiated contact with counsel offering assistance, and counsel responded with a request for her records. The parties had no further contact. A letter from the Office of State Public Defender was also sent to counsel suggesting he associate with co-counsel, and offering case assistance in rural counties (such as Butler County) from more experienced public defenders elsewhere. Counsel did not respond to this letter but did testify

in the state post-conviction proceeding that he spoke with a former classmate and another attorney working as public defenders in St. Louis about the case. His former classmate had only misdemeanor experience.

Crownover's letter referred counsel to a Dr. Manion who had previously examined and treated Kenley in 1975. Counsel never contacted Manion. After receiving Crownover's records, counsel requested a psychiatric examination which was performed by Dr. Parwatikar in 1984 at Fulton State Hospital. Counsel testified that he discussed the Parwatikar report with a non-examining physician, Dr. Wiscowski, for six hours. This is not corroborated by his time card. Counsel testified he then decided not to introduce Kenley's background as mitigating evidence because the information was too old and insubstantial, Parwatikar's report was conclusively non-mitigating, and it was possible additional aggravating information would also be

introduced. Kenley, 759 S.W.2d at 345. Counsel apparently did not seek or review any other records of Kenley's background.

Each court before us reviewed the Crownover, Manion and Parwatikar information reviewed by counsel. Representative of their findings is this summary by the appeals court:

> . . . Kenley had been aggressive, hostile and went into uncontrollable rages and had shown improvement only while on medication in an institution; that Kenley grew up in a non-nurturing environment and had a violent and angry relationship with his father; that all attempts at control, help and treatment of him had proven futile; that Dr. Manion expressed the opinion that "treatment will facilitate adjustment, further adjustment"; and that the latest documentation by either witness was at least 6 years old.

Kenley, 759 S.W.2d at 347.

Prior to the capital trial, counsel waived an automatic change of venue despite the wide publicity Kenley's crimes had received. During voir dire, counsel performed little inquiry into the attitudes of the jurors toward capital punishment and into jurors' ability to consider a range of possible punishments. Counsel waived opening statement and only asked thirty-six cross-examination questions of eight out of twenty-six witnesses. Counsel did not challenge somewhat inaccurate descriptions of Kenley and his vehicle, did not challenge ambiguities and inconsistencies in witness statements, and did not object to a surprise pathologist's report. Counsel also did not object to the admission of cumulative and potentially prejudicial testimonial evidence regarding Kenley's identity, the victim's family, and other weapons unrelated to the crime. Counsel made a short, unremarkable closing argument and submitted no jury

instructions. Capital murder, second degree murder and manslaughter instructions were given by the court.

At the capital sentencing, counsel submitted no mitigating evidence although Kenley's age was stipulated and the prosecution introduced Kenley's single prior conviction. Counsel unwittingly made reference to Kenley's failure to testify and did not object to evidence regarding the deterrent effect of the death penalty introduced by the prosecution. Many similar events occurred (or failed to occur) at Kenley's noncapital trial. In addition, counsel made no closing argument and did not move for severance of charges (robbery, kidnapping, assault and theft). By the close of the noncapital trial, counsel had accepted a job with the prosecuting attorney's office.

The district court, applying the presumption of correctness, adopted the state court

findings regarding the Crownover, Manion and Parwatikar evidence. It characterized the evidence as "scant" mitigating evidence. Mem. Op. at 40. The district court ruled that Kenley had procedurally defaulted on a t least some part of twenty-five of his thirty-five claims for relief from the capital conviction and on two of his twelve claims for relief from the noncapital convictions. The court concluded cause and prejudice had not been demonstrated on any barred claims. Id. at 4. The district court determined the remaining claims were without merit after deferentially reviewing the state court fact findings and legal conclusions.

STANDARD OF REVIEW

Likewise, this court undertakes a deferential review when considering the factual findings of the state and district courts. As we have consistently said in recent decisions, we apply a presumption of correctness to state court findings of fact, we review claims of

ineffective assistance of counsel de novo as a mixed question of fact and law, and we only review those claims which were fairly presented first to the state courts and the federal district court, unless cause and prejudice or miscarriage of justice are shown sufficient to excuse default. See, e.g., Bolder v. Armontrout, 921 F.2d 1359, 1361 (8th Cir. 1990), reh'g denied, 928 F.2d 806 (8th Cir. 1991); Laws v. Armontrout, 863 F.2d 1377, 1831-82 (8th Cir. 1988) (en banc), cert. denied, 490 U.S. 1040 (1989).

PRELIMINARY ISSUES

The petition for habeas relief contained several different claims of ineffective assistance of counsel and other claims based on allegedly inadmissible evidence, incorrect jury procedures and instructions, and violation of the eighth amendment. Having reviewed the relevant opinions of the respective courts and the excerpts from state court filings contained in

the record, we affirm the district court's determination of procedural bar with regard to twelve of Kenley's claims.[1] These claims were not adequately presented to the state courts, and Kenley did to meet his burden of showing cause and prejudice or miscarriage of justice of justice. See Murray v. Carrier, 477 U.S. 478 (1986); Wainwright v. Sykes, 433 U.S. 72 (1977).

As for the other claims determined to be in default by the district court, we find probative evidence in the record and in the text of the district court's memorandum opinion that suggests these issues may have been sufficiently presented to avoid default.[2] However,

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[1]The twelve claims which we agree were defaulted are capital claims 8, 12 (supplement), 21, 24, 28, 29, 31, 32, 33 (part) and 34, and noncapital claims 10 and 12.

[2]Very clear examples of issues presented to the state courts but determined barred by the district court are capital claims 4 - 6 and

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notwithstanding this possibility, we conclude that all but two of these claims were either thoroughly and adequately addressed by the state courts, or were insufficient, separately and collectively, to justify habeas relief in light of the overwhelming evidence of guilt.[3] See Long v. Iowa, 920 F.2d 4, 6 n.2 (8th Cir. 1990) (at least where relief is denied, court may by-pass procedural bar and address the merits if it is the simpler issue). With respect to the claims denied by the district court on the merits,[4] we conclude that as to all but two of

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(Footnote Continued)
35. Claims 4 - 6 assert that counsel's inexperience resulted in ineffectiveness. Claim 6e! of Kenley's Missouri post-conviction relief petition raises this precise issue. Mem. Op. at 9. Claim 35 asserts cruel and unusual punishment under the eighth amendment. The Missouri Supreme Court addressed this issue on direct appeal. Kenley, 693 S.W.2d at 83.

[3]The potentially barred claims we dispose of on other grounds are capital claims 3 - 7, 13, 16 - 17, 19, 22, 26, 30 and 35.

[4]The claims denied by the district court on

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these claims the district court did not err in applying the presumption of correctness to state court fact findings, and we do not disagree with its conclusions of law. The denied claims are simply insufficient to justify relief in light of the overwhelming evidence of guilt or are otherwise meritless.

Of the claims the district court denied on the merits, this leaves for our consideration capital claims 2 and 33. Claim 2 states that "trial counsel was ineffective at the punishment stage of petitioner's capital murder trial in that he failed to present the medical, psychological and psychiatric testimony and reports" of Crownover and Manion. Claim 33 asserts ineffectiveness for failing to present evidence of prior Farmington State Hospital admissions. We

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(Footnote Continued)
the merits which we similarly deny are capital claims 9 - 12, 14 - 15, 18, 20, 23 and 25, and non-capital claims 1 - 9 and 11.

also consider capital claims 1 and 27 because excerpts from the state court filings quoted in the record and the text of the information considered by the state courts persuade us that these claims were adequately presented to the state courts to avoid procedural default. Furthermore, though stating the two claims were barred, the district court considered their merits to a great extent because of overlap with claims it considered on the merits.

PROCEDURAL DEFAULT

Claims 1 and 27 charge that counsel failed to present available mitigating witnesses during sentencing. In Kenley's pro se post-conviction relief petition, claim ¢b!, Kenley states "¢c!ounsel failed to present available mitigating evidence to the jury during the penalty phase portion of the trial," and then follows with nonexclusive examples of specific witnesses and reports, including "such witnesses and records documenting a mental condition of movant

which would have been admitted as mitigating circumstances both as to guilty ¢sic! and punishment." Mem. Op. at 9. In claim ¢c! Kenley states "¢c!ounsel failed to properly investigate movant's case," and refers to specific failures to pursue referenced leads contained in his social history. Id. In Kenley's brief on appeal from the denial of post-conviction relief, claim ¢1!, he states "counsel failed . . . to investigate and present such evidence in that counsel had access to lay and psychiatric evidence concerning Kenley's background, turbulent and abused family history, and psychiatric record ¢sic! including evidence that his condition could yet be improved (emphasis added)." Id. at 11-12.

The circuit court characterized Kenley's claim as "failure to produce mitigating evidence at the sentencing phase of the trial" and later as a general failure to produce mitigating evidence. Circuit Court Opinion at 1, 3. The

appeals court characterized Kenley's point of error broadly as a failure to investigate for and present mitigating psychiatric evidence. Kenley, 759 S.W.2d at 344. The district court similarly characterized the issue as counsel's decision to not further investigate and present mitigating psychiatric evidence. Mem. Op. at 38. The district court also mentioned counsel's investigation into "other information potentially relevant to mitigating circumstances," though it gave no details and made no findings regarding that investigation. Id. at 38.

The principal evidence which Kenley seeks to have us consider relating to the barred claims is unreviewed medical reports of Dr. Richards and from the military, and family testimony regarding Kenley's background and recent observations of his behavior and condition corroborative of his diagnosed psychiatric and substance abuse problems.

We have not applied an unreasonable standard when deciding whether habeas clams have been adequately presented to the state court. The same factual arguments and legal theories should be present in both the state and federal claims. Tippit v. Lockhart, 903 F.2d 552, 554 (8th Cir.), cert. denied, 111 S.Ct. 301 (1990). This means that the federal claim should not present significant additional facts such that the claim was not fairly presented to the state court. Stranghoener v. Black, 720 F.2d 1005, 1007-08 (8th Cir. 1983). We may review claims as long as they are closely related to claims presented to the lower courts, Guinan v. Armontrout, 909 F.2d 1224, 1226-27 (8th Cir. 1990), cert. denied, 111 S.Ct. 800 (1991), but we have required at least an "arguable factual commonality." See Bolder, 921 F.2d at 1364 n.9 (quoting Laws, 863 F.2d at 1387 n.10).

As stated, the failure to investigate and present expert and lay mitigating evidence of

Kenley's background and medical problems was raised by the filings in state court. The state courts discussed counsel's failure to present mitigating evidence and his decision not to investigate further. The district court considered these same issues. Mem. Op. at 38. the transcript of the post-conviction relief hearing contain admissions by Kenley and counsel that they discussed the topic of family witnesses. Dr. Parwatikar's report states that he contacted family witnesses. The records and reports considered by the courts documented the existence of Dr. Richards's report, Kenley's military service, names of family members familiar with Kenley's problems, and Kenley's substance abuse problems. Therefore, claims 1 and 27 were presented to the state courts and appear to be substantially based on the same facts and evidence as the two claims before us. Applying the stated standards to these facts, we conclude that claims 1 and 27, as they relate to the Dr. Richards and military reports, and to the family

testimonial evidence we mentioned, were properly presented to the state courts and our review is not barred.

INEFFECTIVE ASSISTANCE OF COUNSEL

Based on the preceding discussion, the precise issue before us is the question whether Kenley received ineffective assistance of counsel during the sentencing phase of his capital trial due to counsel's failure to present available family and expert mitigating evidence of his medical, psychological and psychiatric history. The primary evidence that Kenley relies upon for reversal is his social history, his pre-examination report, reports by Drs. Manion and Richards, his military record and family witness testimony.

Ineffectiveness during the guilt phase, though briefed by Kenley, is not now at issue. As we stated, many of his claims raising this issue were thoroughly and adequately addressed

by the state courts or were otherwise meritless. Some were defaulted and others were redundant. As to the guilt phase ineffectiveness claims reviewed by the district court, we do not opine as to whether counsel's performance failed to meet the minimum constitutional standard because we find no prejudice given the overwhelming evidence of guilt. this included the in-court testimony of seven eyewitnesses to the murder and the corroborating testimony of twenty-six total witnesses. See Strickland v. Washington, 466 U.S. 668, 697 (1984) (performance need not be evaluated if there is not prejudice).

To grant relief based on a claim of ineffective assistance of counsel, we must find (1) counsel's performance was constitutionally ineffective (performance test) and (2) the ineffective performance resulted in prejudice (prejudice test). Id. at 687. With the performance test, we start by presuming that counsel provided effective assistance, and we do not use

hindsight to question counsel's performance. Id. at 687-88.

With the prejudice test, we evaluate the outcome of the proceeding in question. The ineffective performance must create a reasonable probability that the result of the proceeding is unreliable; the ineffectiveness must undermine our confidence in the proceeding. Id. at 693-94. This means more than just a conceivable effect on the outcome but something less than the oft used "more likely than not" or preponderance standards. Id. In the context of a death sentence, we must determine the question whether, but for counsel's deficient performance, there is a reasonable probability the jury would have concluded the balance of the aggravating and mitigating circumstances did not warrant death. Id. at 695.

The Supreme Court requires that counsel make a reasonable investigation in the

preparation of a case or make a reasonable decision not to conduct a particular investigation. Id. at 691. Counsel's "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgment support the limitations on investigation. Id. at 690-91. We have also considered these principles in our circuit and have held that counsel must exercise reasonable diligence to produce exculpatory evidence and strategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel. Eldridge v. Atkins, 665 F.2d 228, 235-37 (8th Cir. 1981), cert. denied, 456 U.S. 910 (1982).[5] Failing to interview witnesses or discover

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[5]"It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty." Eldridge, 665 F.2d at 232 (citation omitted).

mitigating evidence relates to trial preparation and not trial strategy. Chambers v. Armontrout, 907 F.2d 825, 828 (8th Cir.) (en banc), cert. denied, 111 S.Ct. 369 (1990). Counsel's performance may be found ineffective if s/he performs little or no investigation. See, e.g., id. at 829-31 (counsel's failure to investigate enough to find substantial, available mitigating evidence is ineffective assistance); Thomas v. Lockhart, 738 F.2d 304, 308 (8th Cir. 1984) (counsel's reliance on medical report and interviews with defendant only was an inadequate investigation); Pickens v. Lockhart, 714 F.2d 1455, 1467 (8th Cir. 1983) (abdication of investigative duty is ineffective assistance of counsel). We have stated that failing to present mitigating evidence may be ineffective assistance if, due to inadequate trial preparation and investigation, "counsel has through neglect failed to discover such evidence . . . ." Laws, 863 F.2d at 1385.

A. Performance Test

Kenley contends that the Crownover, Manion and Parwatikar evidence, and his discussions with counsel, should have led counsel to further investigate for mitigating evidence. We must evaluate the reasonableness of counsel's decision not to investigate further in light of what he knew or should have known.

The state primarily focused on counsel's decision not to present any mitigating evidence rather than the decision not to investigate further, but it appears the same reasoning was relied upon for both analyses. In reaching the legal conclusion that counsel's decision was reasonable, the state court's relied on counsel's conclusions that available mitigating evidence was too insubstantial and too old, that Dr. Parwatikar's findings were conclusively non-mitigating, and that additional aggravating information would exceed mitigating information. The first two contentions we

address now; the third we save for our prejudice discussion. The district court concluded, without discussion, that counsel had conducted a thorough investigation and his decision not to investigate further was reasonable in light of the information he had. Mem. Op. at 41. We have some trouble with these unsupported conclusions.

The fact findings made by the state courts regarding the Crownover, Manion and Parwatikar evidence that were used to support their legal conclusions were fairly similar. The circuit court which held Kenley's state post-conviction proceeding concluded:

> The sum total of Mrs. Crownover's testimony would be that as a young boy between the ages of 11 years and 15 years, the defendant had been aggressive, hostile and not functioning in the classroom and as a result of such conduct, he had been expelled from school. The testimony of Dr. Manion would have been that as a teenager the defendant would go into a state of uncontrollable rage, that he was extremely defensive, difficult to work with, not

> communicative, expressed negative and hostile feelings toward his family, especially his father, that he had only really shown any improvement while on medication in an institutional situation.

Circuit Court Opinion at 3 - 4. The circuit court also concluded that "¢n!either Dr. Manion's nor Mrs. Crownover's testimony would conclusively show that the defendant was suffering from any mental disease or defect." Id. at 4. The appeals court reached a similar conclusion. Kenley, 759 S.W.2d at 347.

We think these fact findings are unfairly slanted against Kenley, are incomplete and are only partially supported by the record. We are therefore unable to deferentially and exclusively rely on them. In an attempt to justify counsel's decision, the state and district courts have trivialized the information contained and referred to in the Crownover and Manion records, characterizing it as "scant" mitigating evidence, and have further overstated the conclusiveness of Dr. Parwatikar's report. Most of

the mitigating information has been omitted from their fact findings. By way of supplement we offer additional facts adduced from the materials which wee available to counsel and the state courts to better reflect the true picture of mitigating and aggravating evidence reviewed by counsel.

Kenley was first treated at the Poplar Bluff, Missouri diagnostic center in 1971. He was next treated at the outpatient clinic of Farmington State Hospital in 1973, then again in 1975. The admissions appear to have been related to behavioral problems at home in school. Kenley was treated again at the Poplar Bluff diagnostic center in 1975 after he experienced fainting spells. From there he was sent to the Lutheran Medical Center where many of his medical problems were first documented. The records contain information on suicide attempts, abnormal tracing in Kenley's EEG which was considered "not conclusive of convulsive disorder," drug

use, anxiety and hostility. The records contain a reference to the fact Kenley was sleeping with a gun under his bed for fear of his father. His problem was diagnosed as a possible seizure disorder. The same year Kenley was first treated by Dr. Manion. In 1977 Kenley was treated by Dr. Richards at Farmington State Hospital and was also discharged from the military due to a suicide attempt. Names of family members appeared at various points in the reports and records with respect to incidents and interviews. This information was all referred to in one or more of Crownover's records, the pre-examination questionnaire, and Parwatikar's report.

Before Dr. Parwatikar's examination of Kenley, Crownover completed a pre-examination questionnaire. In that questionnaire and in her social history she documented Kenley's troubled home life and childhood, including the divorce of his parents, environmental instability, a

father with psychiatric problems who threatened Kenley on many occasions, and aggressive, sometimes violent behavior by Kenley. She also documented Kenley's alcohol problem, the prescription drug treatments, and that Kenley served in the military.

Dr. Manion's records document Kenley's report of his father's threats. They also document that Kenley's father had a chronic mental illness and was a continuing psychiatric outpatient. Dr. Manion concluded Kenley had an unsocialized behavior disorder and prescribed anti-depressants used for mental patients to try to normalize his behavior. The medication resulted in some improvement in Kenley's behavior, and Dr. Manion opined that with continued treatment Kenley "would be improved." Kenley's EEG was considered abnormal by Manion but was inconclusive of convulsive disorder.

After considering interviews with Kenley and other limited background information, Dr. Parwatikar performed intelligence, brain function and personality tests on Kenley. Parwatikar concluded Kenley had an anti-social personality disorder (based on personality test results), but was competent to stand trial and was not suffering from an exculpatory mental disease or defect. Dr. Parwatikar reached no diagnosis regarding the results of Kenley's intelligence and organic brain functioning tests, although his report notes some tests were inconclusive and inconsistent. The report also documents Kenley's alcohol and drug problems and two potential suicide attempts, one in the military and one drug overdose. The report documents one violent incident during Kenley's incarceration.

Only combined with our summary here would the findings of the state and district court even begin to portray an accurate picture of the

information which counsel reviewed. Counsel testified that he viewed the possible psychiatric and medical testimony as mitigating but felt it was simply too old and inadequate to overcome Dr. Parwatikar's conclusive findings. Counsel apparently missed the references in these materials to the more recent evidence of Dr. Richards' report and Kenley's military record. Each was more recent and more mitigating than Dr. Manion's report. Counsel should have been aware of these as they were clearly documented in one or more places in the information he considered.

The record before us contains Dr. Walker's 1977 report. It states that Kenley has "possible organicity" and suffers from an anti-social personality disorder. The report also documents Kenley's drug abuse and states that there is some indication of pathology possibly contributing to anxiety or schizoid thinking. The report documents an abnormal EEG which "suggests a possible convulsive disorder" and MMPI test results

with "peaks on the psychopathic deviate, manic and paranoid scales."

Kenley's military record documents a wrist slitting incident. The military medical records labeled the incident as both a "suicide gesture" and "suicide attempt." The medical evaluation was that Kenley had "suicidal tendencies" and a personality disorder. The record suggests Kenley attempted suicide as a way to get out of the military, as fact Kenley confirmed to Parwatikar. After the wrist slitting incident he was reassigned and was eventually discharged as unsuitable for military service.

Had counsel merely reviewed the information he had and requested the additional reports, he would have found additional documentation of Kenley's problems so as to bolster Manion's findings and further challenge the conclusiveness of Parwatikar's report. As it was, counsel only became aware of Kenley's history after

Crownover initiated contact with him. In fact, the only investigation initiated by counsel was his request for the prison psychiatric examination and his discussion with a non-examining doctor.

In addition to this expert evidence, certain family members had even more recent contact with Kenley and had continued to observe problems and behavior consistent with that documented by Manion, Richards and the military doctors. Family references were contained in Kenley's social history, some were allegedly contacted by Parwatikar, others were discussed with counsel, but none were contacted by counsel. Counsel testified, ant the State alleges, that family members were not contacted or called as witnesses because Kenley instructed counsel not to do so. The transcript excerpts in the record only clearly demonstrate that Kenley instructed

counsel not to call his father and grandmother.[6] Kenley's case is distinguishable from those where a defendant instructs counsel not to call certain witnesses and counsel has no way of knowing about other possible witnesses, Bolder, 921 F.2d at 1363-65, as well as those cases where witnesses were contacted, were not willing to testify favorably, or were unable to provide any material mitigating testimony. Id. (several witnesses contacted); Guinan, 909 F.2d at 1231 (family witnesses were not called but were interviewed); Stokes v. Armontrout, 851 F.2d 1085, 1095-96 (8th Cir. 1988) ("not enough to merely speculate that a tearful parent on the stand might evoke pity"), cert. denied, 408 U.S. 1019 (1989).

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[6]After repeated questioning on this issue at his post-conviction hearing, Kenley once ambiguously responded in the affirmative to a question regarding his desire not to get family involved. However, Kenley stated numerous times that he only asked that his grandmother and father not be contacted as witnesses.

The affidavits included in the district court file contain statements by roughly a dozen family members further corroborating the facts of Kenley's disadvantaged childhood and his drinking problems, as well as his good qualities such as trustworthiness, work ethic, and so forth. Two of the affiants state they approached counsel with their willingness to provide information about Kenley and sympathetic testimony on Kenley's behalf at trial, but counsel declined. Several affiants also state they saw Kenley the morning after his arrest at the jail and that he was drunk. This fact is corroborated by articles based on witness accounts appearing in the Daily American Republic and a statement made by Sheriff Link of Butler County to counsel before trial that he saw Kenley in a tavern the afternoon before the crimes and that he had second-hand knowledge that Kenley purchased alcohol the night of the crimes.

Turning to counsel's other justification for not presenting available mitigating evidence, that Parwatikar's report was conclusively non-mitigating, if counsel would have reviewed the report closely, he would have found it not so conclusive after all. This is so even without regard to the additional undiscovered reports and witnesses. Parwatikar's report states that he based his findings on the examination he performed, the police report, records of Kenley's 1977 admission to Farmington State Hospital, and interviews with Kenley's family. However, Parwatikar's report contains no reference to Manion or her diagnosis, or to Richards whose 1977 report Parwatikar states he reviewed. The report also indicates Parwatikar knew of Kenley's military record through discussions with Kenley, not from having reviewed the record itself. Parwatikar's report states family was contacted, but no names are listed, no affiants have stated as much, and the record contains no evidence of such contact. The report is

inconclusive in two of the three test categories of the examination and Parwatikar's personality diagnosis is not inconsistent with prior diagnoses.

Due to the omissions and incomplete test results, Parwatikar's report can hardly be said to be conclusively non-mitigating. An incomplete or inconclusive report does not obviate the possible significance of older evidence just because it is more recent. Thomas, 738 F.2d at 309 (such a report only found to somewhat reduce the probability of prejudice). The Thomas decision has other similarities to the present case. Thomas's counsel relied solely on his interviews with Thomas and his review of defendant's social history. Thomas had been in the mental hospital on five different occasions, had attempted to overdose on drugs, and was a psychiatric outpatient. This court found ineffective assistance of counsel due to inadequate investigation. Id. at 308. Kenley's counsel did not do much more

than Thomas's counsel, yet Kenley's background was more substantial and better documented.

The fact that Parwatikar's report rules out a mental disease or defect and incompetency does not mean it rules out lesser but potentially mitigating conditions and disorders. We are aware of no legal authority strictly limiting mitigating medical, psychiatric and psychological evidence to that of legal insanity or incompetence. In fact, evidence of conditions, disorders and disturbances are precisely the kinds of facts which may be considered by a jury as mitigating evidence. See Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982).

None of the information we have discussed was hidden from counsel. References were made to it or it was brought to his attention in the course of his review of materials and his representation of Kenley. We believe that the evidence considered by counsel, along with the

evidence that would have been discovered through further investigation, contained much potentially mitigating evidence. Hitchcock v. Dugger, 481 U.S. 393, 398 (1987) (evidence consisting of family testimony, troubled and difficult background, prior criminal history or lack thereof, and prospects for rehabilitation are all admissible as mitigating evidence); Eddings, 455 U.S. at 113-16 (facts about family background, personal history, emotional disorders, age, emotional disturbance, beatings by one's father, and slow mental development are admissible mitigating evidence). Thus, this case may be distinguished from one like Laws where the court found that defendant's records revealed no mitigating medical or psychiatric problems.

When counsel makes a decision not to further investigate, that decision is only reasonable to the extent professional judgment makes the limitations placed on further investigation reasonable in the circumstances. Strickland, 466

U.S. at 690-91. We will not fault a reasonable strategy not to investigate further if it is based on sound assumptions. Pickens, 714 F.2d at 1467. Here it was not a reasonable strategy that led counsel not to investigate, but lack of thoroughness and preparation. "Counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made." Chambers, 907 F.2d at 835 (quoting United States v. Gray, 878 F.2d 702, 711 (3rd Cir. 1989)).

In sum, the state court fact findings were incomplete and counsel's decision to stop investigating was unreasonable because his belief that mitigating evidence was too old and insubstantial resulted from his failure to follow available leads to more recent and persuasive mitigating evidence. counsel's investigation fell short of what was required in this case. We also feel counsel unreasonably concluded

Parwatikar's report was conclusively non-mitigating because the report itself was incomplete, often inconclusive, and did to rule out the possibility of mitigating evidence of disorders, conditions and disturbances.

B. Prejudice Test

Having found counsel's performance deficient for failing to further investigate available and potentially mitigating evidence, we must now decide whether counsel's performance prejudiced Kenley. The standard by which we judge prejudice is whether we find a reasonable probability that the outcome of the sentencing proceeding would have been different but for counsel's ineffectiveness. A reasonable probability is one sufficient to undermine our confidence in the outcome of the proceeding. We believe there is a reasonable probability Kenley would not have received a death sentence if some of the mitigating evidence had been presented.

The state courts and district court concluded as a matter of law that there was no prejudice because the mitigating evidence was "scant" and the aggravating evidence would have been more damaging. We have demonstrated that the state court fact finding was not supported by the record because the potential mitigating evidence was substantial. We do not agree as a matter of law that there was no prejudice because the other evidence would have significantly worsened the perception of Kenley's character. Rather, we believe the testimony would have put the aggravating evidence in context along with the mitigating evidence.

The state courts' conclusion on this issue was based on counsel's beliefs that the mitigating evidence would be unpersuasive to a jury in light of Dr. Parwatikar's report and additional potentially aggravating information. We do not believe reasonably effective counsel would have reached the same conclusion if, in addition to

reviewing Crownover's records, counsel would have interviewed Dr. Manion and Dr. Richards or at least reviewed their reports, reviewed Kenley's military file, and interviewed family witnesses concerning Kenley's history and his condition the morning after arrest. This additional information would have been more than enough to mount a challenge to Parwatikar's report. The medical evidence of Kenley's condition may fall short of a mental disease or defect diagnosis but it is more tan just the borderline non-severe personality disorder we found in Smith v. Armontrout, 888 F.2d 530, 534 (8th Cir. 1989), and is more akin to an extreme personality or emotional disorder or disturbance. Cf. Strickland, 466 U.S. at 700 (at most evidence showed defendant was generally a good person, under a lot of stress, but not suffering from an extreme disturbance of any kind). Also, Kenley's alcohol problems were well documented by all doctors, and when combined with other evidence from the sheriff, news accounts and

family testimony, would have been probative mitigating evidence of intoxication.

With regard to the potential for additional aggravating information, the most damning information in Parwatikar's report is the determination that Kenley was not insane or incompetent. As stated, as far as we are aware, such conditions are not prerequisites to information being considered mitigating evidence. See Eddings, 455 U.S. at 114-15; Hayes v. Lockhart, 852 F.2d 339, 349 (8th Cir. 1988) (psychiatric report stating defendant did not have mental disease or defect but documenting alcohol problem and anti-social personality disorder admitted as mitigating evidence), rev'd on other grounds, 491 U.S. 902 (1989).

The other potentially damaging information consists principally of Kenley's anti-social behavior, violence and arrests (not convictions) when he was a minor. His sole conviction was

already in evidence. Had all the reports been introduced into evidence and had all affiants and doctors testified, we do not deny the jury would have heard aggravating information. After conducting a reasonable investigation, counsel may conclude that the introduction of the mitigating evidence "would barely have altered the sentencing profile presented", Strickland, 466 U.S. at 700, or that harmful information is greater than potential helpful information, and choose not to present certain evidence. Burger v. Kemp, 483 U.S. 776, 789-91 (1987); Guinan, 909 F.2d at 1231. In this case we have concluded counsel did not conduct a reasonable investigation. But even if he had, in the context of what the jury had already heard at trial about Kenley's crazed and violent actions on the night of the crimes, we are doubtful that much of the additional aggravating information would have had any significant incremental aggravating effect on the jury. Furthermore, the aggravating

information was mostly cumulative. Chambers, 907 F.2d at 829-30.

Given the sympathetic light in which Kenley's past behavior could have been presented, in the context of his family and medical background by Crownover and family affiants, given the significant evidence of medially significant conditions and disorders, suicidal tendencies, alcohol abuse and intoxication, and the prospects for successful treatment, we believe it was unreasonable for counsel to have presented no mitigating evidence.

Reasonable counsel might have been somewhat selective in his evidence presentation, but would not have cast aside all the mitigating evidence in this case. See Guinan, 909 F.2d at 1229 (after thoroughly reviewing all medical and psychiatric records, counsel requested a second psychiatric opinion); Smith v. Armontrout, 888 F.2d at 535 (decision by counsel to offer a

mitigating circumstance, "support it with expert testimony, but leave out documents that would at best have brought some additional increment of support for the diagnosis, while also carrying a substantial risk" of making things worse, not unreasonable); Hayes, 852 F.2d at 348-51 (counsel not ineffective for introducing only part of medical and psychological evidence where counsel conducted a thorough investigation, did introduce evidence of alcohol problems and treatment prospects, called live witnesses, and introduced psychiatric report into evidence). For the reasons stated, we find prejudice.

CONCLUSION

The State argues and the district court infers that recent case authority in our circuit does not support the legal conclusions we reach in this case, and suggests our existing authority creates an almost insurmountable barrier to habeas relief. We disagree with this general characterization of our case authorities

although, as a practical matter, the strong presumption in favor of counsel and the heavy burden on the defendant established by the Supreme Court in Strickland means determinations of ineffective assistance of counsel such as in the present case will likely occur infrequently.

Having found deficient performance and prejudice in the sentencing phase of the present case, we conclude counsel was ineffective. We therefore reverse so much of the judgment of the district court as denied the writ with respect to the death sentence and remand this case to the district court with instructions that the State of Missouri be required to vacate Kenley's death sentence and either reduce it to a life sentence without parole or conduct a new sentencing procedure within one hundred eighty days from and after the issuance of the district court's order. See Mo. Stat. Ann. Section 565.035 (5)(2) - (3) (1983).

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

KENNETH L. KENLEY,	)	
	)	
Petitioner,	)	
v.	)	No. 88-2298C(3)
	)	
BILL ARMONTROUT,	)	
	)	
Respondent.	)	

MEMORANDUM

This matter is before the Court on the petition of Kenneth Lee Kenley for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

In June 1984, petitioner was convicted of capital murder in the January 1984 death of Ronald Felts. The jury recommended the death penalty and petitioner was sentenced accordingly. On direct appeal, the Missouri Supreme Court affirmed the conviction and sentence. State v. Kenley, 693 S.W.2d 79 (Mo. banc 1985), cert. denied, 475 U.S. 1098 (1986). Thereafter, petitioner filed in state court a request for relief under then-effective Missouri Supreme Court Rule 27.26. After an evidentiary hearing, the trial

court made findings of fact and conclusions of law, and entered judgment denying the request for relief under Rule 27.26. The Missouri Court of Appeals affirmed that ruling. Kenley v. State, 759 S.W.2d 340 (Mo. App. 1988).

On November 30, 1988, petitioner filed in this Court his original pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner's appointed counsel subsequently filed an amended petition.

Now before the Court are some thirty-five claims for federal habeas relief based on alleged violations of federal constitutional guarantees to effective assistance of counsel, and of the sixth and eighth amendments to the United States Constitution.

With respect to most of petitioner's claims, respondent generally urges either (1) the claims are barred from consideration by this Court absent a showing of cause and prejudice pursuant to Wainwright v. Sykes, 433 U.S. 72, 81-91 (1977), and neither "cause" nor

"prejudice" exists as to those claims; or (2) the claims are without merit, and petitioner's convictions and sentence should be upheld on the present record.

Ordinarily, a federal court reviewing a state conviction in a 28 U.S.C. § 2254 proceeding may consider only those claims which the petitioner has presented to the state court in accordance with state procedural rules. See Engle v. Isaac, 456 U.S. 107, 125, 135 (1982). This requirement involves consideration of both the question whether the petitioner has exhausted all remedies available in the courts of the state, see Humphrey v. Cady, 405 U.S. 504, 516 (1972), and whether he has preserved his claims for federal habeas corpus review by complying with state procedural rules governing their presentation. Engle, supra, 456 U.S. at 124-25, 125-26 n. 28.

A review of the record reflects that petitioner has no presently available state remedies. It seems, therefore, that he has satisfied

the exhaustion requirement. Additionally, the parties do not now contend there are any state remedies presently available for the consideration of any of petitioner's claims. Thus, the exhaustion requirement has been met. The Court must determine whether all of petitioner's claims were properly presented to the state courts.

Where a Federal habeas petitioner raises "contentions of federal law which were not resolved on the merits in the state proceeding due to [petitioner's] failure to raise them there as required by state procedure," the federal court may not address the merits of those claims absent a satisfactory showing of "cause" and "prejudice." Wainwright, supra, 433 U.S. at 87 (emphasis in original). In particular, before addressing the merits of any such claims, this Court must find that (a) petitioner has established adequate cause for his failure to present such claim(s) and, if so, (b) that there was actual prejudice to petitioner as a result of

the state court's failure to address those claims.[1] Worthan v. Wyrick, 805 F.2d 303, 305

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[1]The cause and prejudice showing is necessary to override petitioner's procedural default except "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. 478, 496 (1986). See also Engle, supra, 456 U.S. at 35 (in appropriate cases, the cause and prejudice showing "must yield to the imperative of correcting a fundamentally unjust incarceration"); cf. Smith v. Murray, 477 U.S. 527, 538-39 (1986) ("there is [nothing] 'fundamentally unfair' about enforcing procedural default rules in cases devoid of any substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination.")

Here, the record does not support any contention that petitioner is "actually innocent" of the murder charge, or that the state trial court proceedings ended in a "fundamentally unjust" result. The record establishes petitioner embarked upon a crime spree in the late hours of January 3 and the early hours of January 4, 1984. During his crime spree, petitioner shot and killed one patron of a lounge, robbed a liquor store, a motel, and a lounge, kidnapped two women, shot and wounded a bartender and a kidnap hostage, and attempted to sexually assault his kidnap hostages. Accordingly, the Court will address the cause and prejudice tests with respect to each claim respondent contends is barred by petitioner's failure properly to present the claim(s) to the state courts.

(8th Cir. 1986), cert. denied, 481 U.S. 1019 (1987); Parton v. Wyrick, 614 F.2d 154, 157 (8th Cir.), cert. denied, 449 U.S. 846 (1980). This test applies whether the failure properly to present the claim(s) to the state courts results from conduct by petitioner's counsel, see, e.g., Wainwright, supra, or from conduct by petitioner proceeding pro se, Vasquez v. Lockhart, 867 F.2d 1056, 1057-58 (8th Cir. 1988), cert. denied, 57 U.S.L.W. 3792 (U.S. June 5, 1989)(No. 88-6481); Smith v. Lockhart, 843 F.2d 295, 298 (8th Cir. 1988). Where cause is not established, the Court does not need to examine whether petitioner suffered "actual prejudice," Engle, supra, 456 U.S. at 134 n.43; **Stokes** v. Armontrout, 851 F.2d 1085, 1093 (8th Cir. 1988), cert. denied, 109 S.Ct. 823 (1989). Similarly, where there is no prejudice to petitioner, the Court need not address the "cause" element. United States v. Frady, 456 U.S. 152, 168 (1982).

Missouri procedure requires the presentation of a constitutional claim "be made at the

first opportunity and preserved at each step of the judicial process." Benson v. State, 611 S.W.2d 538, 541 (Mo. App. 1980). In a jury-tried criminal case, such as petitioner's, this principle requires:

(1) a contemporaneous objection where necessary during the course of trial, see State v. Kenner, 648 S.W.2d 552, 554 (Mo. App. 1983)(no appellate review of alleged error in examination of witness was preserved where a timely objection was not made during trial); State v. Hayes, 624 S.W.2d 16, 20 (Mo. 1981)(objection and proper request for relief is necessary to preserve appellate review regarding closing argument), and, if appropriate, an offer of proof, State v. Dixon, 655 S.W.2d 547, 555 (Mo. App. 1983), cert. denied, 464 U.S. 1072 (1984);

(2) inclusion of any allegation of error in a motion for new trial, Mo. R. Cr. P. 29.11(d) and 28.03, State v. McGowan, 636 S.W.2d 354, 357-58 (Mo. App. 1982)(appellate review is

limited to grounds asserted in motion for new trial);

(3) proper briefing of an alleged error on appeal, Mo. R. Cr. P. 30.20, State v. Gilmore, 617 S.W.2d 581, 582 (Mo. App. 1981);

(4) where appropriate, a post-conviction motion under Mo. S. Ct. R. 29.15 (previously Mo. Mo. S. Ct. R. 27.26); and

(5) appeal therefrom, Gilmore, supra, 861 F.2d at 1065-66 and 1065 n.9; Stokes, supra, 851 F.2d at 1092.

Based upon petitioner's failure to assert them at trial, to include them in his motion for new trial, to brief them on appeal, or to pursue them in petitioner's post-conviction proceedings, respondent contends petitioner is barred from suhmitting to this Court, in whole or in part, some twenty-eight of petitioner's thirty-five claims. Petitioner generally asserts that "the procedural default rule can be avoided if a fundamental miscarriage of justice has occurred where 'the alleged error undermined the

accuracy of the guilt or sentencing determination."' Smith, supra, 477 U.S. at 539.

Upon reviewing the available record, the Court concurs with respondent and finds the following claims barred from further consideration, absent a satisfactory showing by petitioner of cause and prejudice:

Claims in petitioner's amended petition designated as numbers 1, 3, 4, 5, 6, 7, 8, supplement to 12, 13, 16, 17, 19, 21, 22, 24, 26, 27, 28, 29, 30, 31, 32, 33 (except with respect to the extent this claim is the same as the claim covered in number 2), 34, and 35.

The only potential "cause" petitioner asserts in light of his failure properly to present the claims to the state courts is the alleged ineffective assistance of his state court trial and appellate counsel.

In Murray v. Carrier, supra, the United States Supreme Court noted that, with respect to procedural defaults during trial or in raising claims on appeal,

> the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel, see Reed v . Ross, 468 U.S. [1,] 16 [(1984)], or that "some interference by officials," Brown v. Allen, 344 U.S. 443, 486 (1953), made compliance impracticable, would constitute cause under this standard.
>
> Similarly, if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not "conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance." Cuyler v. Sullivan, 446 U.S. 335, 344 (1980). Ineffective assistance of counsel, then, is cause for a procedural default.

Carrier, supra, 477 U.S. at 488. The "cause" requirement is not established, however, by "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it." Id. at 486. Furthermore, the ineffective assistance of

counsel claim must "be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." Id. at 489; Wright v. Lockhart, 854 S.W.2d 309, 311 (8th Cir. 1988); Smittie v. Lockhart, 843 S.W.2d 295, 298 (8th Cir. 1988); see also Leggins v. Lockhart, 822 F.2d 764, 768 n.5 (8th Cir. 1987)(noting an ineffective assistance of counsel claim must be presented to the state courts "as an independent claim before it may be used to establish cause for a procedural default or denominated as a ground for habeas relief"), cert. denied, 108 S.Ct. 1080 (1988).

Having reviewed the available record, the Court finds the alleged ineffective assistance of counsel may not constitute cause for petitioner's failure to pursue before the state courts the above-noted claims because that alleged ineffective assistance of counsel was not presented to the state courts. In the direct appeal from his conviction, petitioner did not allege ineffective assistance of trial counsel

in any respect. In his post-conviction motion, petitioner asserted the following as ineffective assistance of counsel:

> [a] Counsel did not professionally conduct a probing and proper voir dire of the jury panel. ie. [sic], counsel failed to ask the jury panel the most basic questions concerning their views as to the imposition of the death penalty; for example:
>
> 1. Who would automatically impose a death sentence after you made a determination that a person deliberately killed?
>
> [b] Counsel failed to present available mitigating evidence to the jury during the penalty phase portion of the trial. ie. [sic], counsel failed to call Lois Crownover, Dr. Maria Manion as witnesses in movant's case or present records from the Lutheran Medical Center; such witnesses and records documenting a mental condition of movant which would have been admitted as mitigating circumstances both as to guilty [sic] and punishment.
>
> [c] Counsel failed to properly investigate movant's case. Counsel specifically failed to:
>
> 1. Follow up on information provided by Mrs. Lois Crownover, a school social worker with the Poplar Bluff Public Schools wherein Mrs. Crownover submitted documentation to counsel suggesting that movant had been seen and treated by certain physicians for a mental disorder or

problem/condition.

2. Contact Dr. Maria Manion and determine movant's condition that was diagnosed and treated by Dr. Manion.

3. Contact Lutheran Medical Center and obtain their records for purpose of documenting movant's mental condition.

[d] Counsel failed to properly object to the introduction of evidence of other crimes. ie. [sic], Mr. Rhew filed motions to prohibit introduction of such evidence prior to trial. The court invited Mr. Rhew to make specific objections to such evidence offered at trial; still Mr. Rhew made no such objections. Even the Appellate Courts at 693 S.W.2d. 79, 81 commented that no objections were made to evidence of other crimes.

[e] Counsel could not have provided competent and professional representation to movant as counsel prior to this trial had only been licensed to practice law for approximately one year, had only one prior jury trial previous to movant's trial, had never tried a murder case, let alone a case where the death penalty was being sought and did not have a second attorney assist him with the difficult aspects of a capital murder trial.

[f] Counsel failed and refused to petition the trial Court to fully and correctly instruct the jury on all lessor included offenses of the crime of Capital murder, i.e. First degree Felony murder and Second degree Felony murder, when said instructions were clearly supported by the evidence.

[g] Counsel failed and refused to object to the trial Court's failure to correctly instruct the jury at each recess, i.e. the giving of MAI-Cr-2d 1.08.

[h] Counsel failed and refused to object to the trial court's imposing sentence upon Movant at the close of all evidence on the grounds that the State had failed to prove venue and jurisdiction.

lil Counsel failed and refused to object to the State displaying a deadly weapon to the jury that was not fully and correctly indetified [sic] as being the same weapon that was allegedly used in the crimes charged.

[j] Counsel failed and refused to conduct a reasonable investigation into the plea-agreement the State had reached with Mr. Peal. Had counsel conducted a reasonable investigation Counsel would have learned that the State had made a deal with Mr. Peal not to prosecute him for selling stolen property in exchange for his testimony against Movant.

[k] Counsel rendered ineffective assistance when Counsel stated in open Court and before the jury that Movant was present at the crime scene. This action denied Movant due process in that said statement was the equivelant [sic] of pleading Movant guilty.

[l] Counsel failed and refused to object to the State presenting evidence of other crimes that Movant was allegedly involved in on the grounds that said evidence denied Movant due process and equal protection of the law.

> [m] Counsel failed and refused to object to the State being allowed to present closing argument first with Movant's Counsel arguing second in the punishment stage of the trial. This denied Movant's Counsel the right to present opening and closing arguments.
>
> [n] Counsel failed and refused to petition the Court to fully and correctly instruct the jury as to the use the jury could make of evidence of other crimes that Movant was allegedly involved in, i.e. to instruct the jury that this evidence could not be used or considered as evidence of Movant's guilt, but could only be considered for such purpose as said evicence [sic] was admitted.
>
> [o] Counsel knowingly proceed [sic] to represent Movant knowing that there was a real conflict of interest between Movant and counsel because Counsel had sought and secured employment with the Prosecuting attorney's Office.
>
> [p] Counsel failed and refused to object to the Court compelling Movant to appear before the Jury while in hand-cuffs.

On appeal from denial of his post-conviction motion, the only ineffective assistance of counsel claims pursued by petitioner were the following:

> [1] The trial court erred in denying appellant's Rule 27.26 motion on the issue of mitigating evidence because counsel failed in his Sixth Amendment duty to investigate and present such

evidence in that counsel had access to lay and psychiatric evidence concerning appellant's genetic background, turbulent and abused family history, and psychiatric record including evidence that his condition could yet be improved. Appellant was prejudiced in that the killing was sudden, the only two aggravating circumstances concerned the circumstances of the crime itself, and evidence of his life history could reasonably probably have resulted in a life sentence.

[2] The trial court clearly erred in denying appellant's 27.26 motion as to both the guilt and punishment phases of his capital trial because his attorney's inexperience manifested itself in ineffective assistance of counsel in that he conducted only the most cursory and ineffectual cross-examination of a handful of the state's witnesses, failed to test the eyewitness identifications or point out the inadequacies in the witnesses' descriptions of the cars involved, failed adequately to develop the evidence militating against a finding of deliberation; made a perfunctory and futile closing argument, and failed to object to inadmissible testimony by the widow and of appellant's possession of numerous unrelated handguns.

[3] The trial court erred in not finding that counsel was ineffective during voir dire in appellant's capital murder trial because the record shows that counsel failed in his duty to secure appellant a

> jury able to consider a life sentence and impartially to consider the guilt phase issues in that he failed to inquire of the jurors if they could consider a life sentence, made no attempt to rehabilitate jurors who had been disqualified as opponents of the death penalty, and failed to inquire about such issues as the juror's ability to follow the presumption of innocence and burden of proof.
>
> [4] The trial court clearly erred in refusing to vacate appellant's death sentence because he was rendered ineffective assistance of counsel at the punishment phase of trial in that counsel failed to submit or argue the statutory mitigating circumstance of no significant prior criminal history though appellant had only one prior conviction for stealing; failed to object to the state's argument that a report, which was not in evidence, showed the death penalty to be a deterrent to crime; and in his own argument made a direct reference to appellant's failure to testify.

Thus, these are the only claims of ineffective assistance of counsel that were adequately presented in the state court postconviction proceeding. Accordingly, since petitioner's present ineffective assistance of counsel claims were

not presented to the state courts, they may not constitute "cause" for purposes of the Wainwright test.

Additionally, this Court notes petitioner would be unable to demonstrate as "cause" the ineffective assistance of his trial or appellate counsel. The "cause" necessary to overcome the procedural bar is "cause" that would be in itself an independent ground justifying federal habeas relief. See Carrier, supra, 477 U.S. at 485-89; Leggins, supra, 822 F.2d at 768 n. 5. A claim of ineffective assistance of counsel in postconviction proceedings is not an independent ground for federal habeas relief. Mitchell v. Wyrick, 727 F.2d 773, 774 (8th Cir.), cert. denied, 469 U.S. 823 (1984); Williams v. Missouri, 640 F.2d 140, 143-44 (8th Cir.), cert. denied, 451 U.S. 990 (1981). Thus, the ineffectiveness of counsel in petitioner's trial and appellate proceedings may not constitute "cause" to overcome a procedural bar.

Having found petitioner has not established "cause" for his failure properly to present to the state courts the above-noted claims, the Court will not address any actual prejudice resulting from any such failure, see Engle, supra, 456 U.S. at 134 n.43; Stokes, supra, 851 F.2d at 1093, and will not consider the merits of those claims.

The Court will now consider the merits of petitioner's remaining claims. In particular, petitioner alleges trial counsel was ineffective (1) in conducting a cursory and ineffectual cross-examination of a handful of the state's witnesses (designated as petitioner's ninth claim); (2) in failing to challenge the eyewitness identifications as presented by the state's witnesses (designated as petitioner's tenth claim); (3) in failing to point out and argue inadequacies in the descriptions of various vehicles involved as presented by the state's witnesses (designated as petitioner's eleventh claim); (4) in failing to develop evidence

militating against deliberation (designated as petitioner's twelfth claim); (5) in failing to object, during the guilt/innocence stage of the trial, to the testimony of the decedent's widow that the decedent had two children (designated as petitioner's fourteenth claim); (6) in failing to object to testimony regarding numerous unrelated handguns in possession of petitioner (designated as petitioner's fifteenth claim); (7) during voir dire, in failing to question the jury panel whether they would automatically impose a sentence of death after a finding of capital murder, i.e., trial counsel failed to "reverse Witherspoon" (designated as petitioner's eighteenth claim); (8) during the punishment stage of the trial, in failing to submit and argue as a mitigating factor that petitioner had no significant history of prior criminal activity (designated as petitioner's twentieth claim); (9) during the punishment stage of the trial, in failing to object to the prosecutor's argument which referred to a report which the

prosecutor had read which indicated the death penalty was a deterrent to crime (said report had not been admitted into evidence)(designated as petitioner's twenty-third claim); (10) during his own closing argument in the punishment stage of the trial, counsel made a direct reference to petitioner's failure to testify (designated as petitioner's twenty-fifth claim); and (11) at the punishment stage of petitioner's capital murder trial, by failing to investigate and possibly present to the jury any possible mitigating evidence on petitioner's behalf concerning the medical, psychological, and psychiatric testimony and reports of psychiatric social worker, Lois Crownover, and child psychiatrist, Dr. Maria Manion, both of whom previously treated petitioner (designated as petitioner's second and thirty-third claims).

In construing the constitutional requirement for effective assistance of counsel, the "benchmark . . . must be whether counsel's conduct so undermined the proper functioning of the

adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). The Court determines whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defense. Id. at 687. In analyzing counsel's performance, the Court must determine whether, under all the circumstances, the "identified acts or omissions were outside the range of professionally competent assistance." Id. at 690. This review is highly deferential for there is a strong presumption that counsel's conduct "falls within the wide range of reasonable professional assistance; that is, the petitioner must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy."' Id. at 689. With respect to the duty to investigate, the Supreme Court stated:

> [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision

> that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. at 691.

A deficient performance alone is insufficient to find counsel was ineffective. The Court must also find prejudice resulted from such performance. To establish the prejudice element, petitioner must show

> there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . When a [petitioner] challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.

Id. at 694, 695. In making this determination, the Court "must consider the totality of the evidence before the judge or jury." Id. at 695.

Petitioner alleges that his trial counsel was ineffective because counsel failed to cross-examine the state's witnesses. Specifically, twenty-six witnesses testified on behalf of the state, and trial counsel elected not to crossexamine eighteen of the witnesses; and of the remaining eight witnesses, trial counsel asked a total of thirty-six questions on cross-examination.

The Rule 27.26 trial court considered this claim and held:

> Movant's complaint that counsel failed to cross-examine witnesses is not supported by any evidence that the testimony of those witnesses would have produced any inconsistencies, contradictions or other items of impeachment of value to the defendant's case. As noted above, the defendant has the burden of showing prejudice.

The Missouri Court of Appeals also made findings concerning this claim on petitioner's appeal to the court from the denial of his 27.26 motion, by stating:

> Appellant complains that

> the attorney cross-examined only eight of the state's twenty-six witnesses. At the hearing, the attorney explained his rationale was not to give the witnesses a chance to repeat their specific identifications and accounts of the events of the night. Appellant challenges the attorney's lack of ferocity in attacking the few inconsistencies in the witnesses' testimonies; to-wit: two of the six eyewitnesses to the murder remember appellant saying he would make "an example" out of them, in addition to consistently testifying to all other words spoken by the appellant; and the witnesses identified the cars driven by appellant in "vague" terms; and one witness only "thought" she could identify appellant.
>
> The attorney explained at the motion hearing that he did not want to give any witness a chance to repeat damaging testimony. In any event, "the extent of cross-examination and the subjects covered must in virtually every case be left to the judgment of counsel." Atkins v. State, 741 S.W.2d 729, 731 (Mo. App. 1987), quoting Williams v. State, 712 S.W.2d 404, 409 (Mo. App. 1986).

Kenley, **supra**, 759 S.W.2d at 349. The above factual findings underlying counsel's performance by the Missouri courts are entitled to the

presumption of correctness in the related federal habeas proceeding established in 28 U.S.C. § 2254(d) unless certain exigencies exist. Sumner v. Mata, 449 U.S. 539 (1981). While such a presumption attaches to any facts underlying an ineffective assistance of counsel claim, it does not apply to the state court's ultimate conclusion about whether or not petitioner's counsel rendered effective assistance. Strickland, supra, 466 U.S. at 698. Petitioner does not contend any circumstance precludes the application of the presumption of correctness, and this Court finds the state courts' findings supported by the record. Upon careful consideration of the record, the Court finds reasonable trial counsel's conduct in not further cross-examining the witnesses at issue here, and trial counsel's performance was not deficient. Trial counsel strategically decided that further cross-examination of the state's witnesses would only emphasize and enable the witnesses to repeat their damaging testimony. Since the Court has not

found petitioner's trial counsel's performance deficient with respect to his conduct on cross-examination, the Court need not and will not address the prejudice prong of the Strickland test for constitutionally ineffective assistance of counsel.

Petitioner next alleges that trial counsel was ineffective in failing to challenge the eyewitness identifications as presented by the state's witnesses, and in failing to point out and argue inadequacies in the descriptions of various vehicles involved as presented by the state's witnesses.

In reviewing these claims, the Missouri Court of Appeals found the claims to be without merit by stating:

> Additionally, although every eyewitness testifying identified appellant unequivocally, except for one witness, appellant contends that he was deprived of effective assistance of counsel in the attorney's failure to impeach that one witness on her "equivocal" identification. The trial transcript reads:

Q: Can you identify the man that had the gun that evening?

A: I think so. Yes. Yes.

Q: Did you see him well enough that you can point him out to the jury?

A: Yes.

Q: Do you see him in the courtroom today?

A: Yes.

Q: Would you point out that man for the jury please?

A: It's the man sitting over there.

Q: Are you indicating the man with the blue shirt seated to the left of [appellant's attorney]?

A: Yes.

The record does show that, even in the face of overwhelming and accurate identifications, the attorney did attempt to undermine the identification testimony by questioning the lighting in the bar that night.

Appellant alleges the following were "vague" descriptions of the cars he drove during his escapade: "a Ford station wagon . . .

> [b]rown and white . . . an older car", "Brown station wagon . . . in its seventies"; "brown Ford station wagon . . . '67 model"; "1973 Ford Ranch Wagon . . . bronze or brown or similar to that"; and with respect to the car appellant took from a patron of the Blue Moon, "'73 Ford Torino"; "gold Torino, Ford". These car descriptions are not vague nor are they necessarily inconsistent, particularly considering the independent basis of each witness' testimony.
>
> There is no merit to these accusations. The question of impeaching a witness is a matter of trial technique and strategy and cannot be the basis of a breach of duty toward appellant. Jackson v. State, 540 S.W.2d 616, 617 (Mo. App. 1976). Moreover, we find these "inconsistencies" minor at best and agree with the hearing court that appellant has not shown how he was prejudiced by not impeaching these witnesses. See Hurd v. State, 637 S.W.2d 809, 811 (Mo. App. 1982).

Kenley, supra, 759 S.W.2d at 349. Once again, the factual findings of the Missouri Court of Appeals are entitled to the presumption of

correctness established in 28 U.S.C. § 2254(d), and petitioner does not contend any circumstance precludes the application of the presumption of correctness. The Court finds the state court's findings supported by the record, and consequently the Court finds trial counsel's conduct reasonable in not further challenging the eyewitnesses' identifications of petitioner as the murderer, pointing out and arguing inadequacies in the descriptions of the various vehicles involved, and trial counsel's performance was not deficient. Trial counsel strategically decided not to pursue and have repeated this line of damaging testimony. Since the Court has not found petitioner's trial counsel's performance deficient with respect to his conduct at issue here, the Court need not and will not address the prejudice prong of the Strickland test for constitutionally ineffective assistance of counsel.

Petitioner also alleges that trial counsel was ineffective by failing to develop evidence

militating against deliberation. In particular, petitioner asserts that trial counsel failed to develop evidence and to raise a reasonable doubt that petitioner's actions were impulsive, and his ability to premeditate was affected on the day in question by intoxication and/or drugged condition preventing him from acting purposely or with knowledge.

In order for an act to be done with deliberation,

> it must be performed in a cool and deliberate state of mind. A finding of this element does not depend upon the time involved as much as it does upon an inference reasonably drawn from the evidence and circumstances surrounding the act. State v. Nelson, 514 S.W.2d 581 (Mo. 1974). Premeditation is thought beforehand of any length of time, however short. State v. Smart, 485 S.W.2d 90 (Mo. 1972).

State v. Wood, 596 S.W.2d 394, 400 (Mo. banc 1980). The element of deliberation mandates that petitioner coolly and fully reflected on his act. State v. Newlon, 627 S.W.2d 606, 614 (Mo. banc 1982).

At trial, the evidence presented by the state established the following to be the events leading up to petitioner's action on the night in question:

At the time of January 1, 1984, petitioner was living as a house guest of Lawrence Peal in Poplar Bluff, Missouri. On that day, petitioner possessed a number of handguns at Peal's house, and of these handguns, petitioner kept one weapon, a silver-colored .38 caliber pistol, in his possession. The next day, Monday, January 2, after purchasing a quantity of ammunition, .38 "hollow-point" shells/ petitioner and a friend went to some woods where petitioner practiced with the pistol by shooting some fifteen rounds of ammunition at trees and a Folger's coffee can. Both Peal and petitioner's shooting companion had seen petitioner wearing a dark blue stocking cap which doubled as a ski mask.

Between 10:30 and 11:30 p.m. on Tuesday, January 3, petitioner borrowed Peal's brown Ford station wagon and drove to the Kater Inn Package

Store in Poplar Bluff. After putting the ski mask over his face, he entered the store with his pistol and threatened to kill the cashier unless the money from the cash register was surrendered. While the clerk was removing the money from the register and placing it on the counter, Sandra Buttry entered the store and petitioner ordered her to lie on the floor. When the robbery was finished, petitioner grabbed Buttry's arm and forced her to accompany him outside, saying that he "had better plans" for her. Petitioner pointed his pistol at Ms. Buttry's male companion who had been waiting outside, and forced Buttry into the brown Ford station wagon and drove away. Once in the car, petitioner removed his ski mask. While petitioner was driving, Buttry asked why he had taken her, to which petitioner replied that he was going "to get a piece of ass." Ms. Buttry demured, and petitioner replied, "shut up, bitch," and ordered her to unzip his pants. When she tried and was unable to do so, petitioner

unzipped his own pants and directed her to "suck it off, bitch." Ms. Buttry then opened the car door and jumped out, whereupon petitioner shot her in the back with his pistol. While being aided by a passing motorist, Ms. Buttry saw petitioner drive past her twice and then continue on in a southerly direction. Ms. Buttry testified that during the time she was in the presence of petitioner, he never staggered, slurred his speech, or appeared erratic in his motions.

At around midnight, some thirty minutes after the robbery of the Kater Inn Package Store, petitioner walked into the Blue Moon Tavern in Poplar Bluff. A total of eight men and women, including three employees and five customers, were inside the tavern; four of these individuals, including Ronald Felts, were gathered around a pool table playing pool. As petitioner entered the tavern, he walked to the center of the room, drew his pistol, and announced, "This is a holdup. Everyone hit the floor. " When the occupants did not hear or

comply with petitioner's order immediately, petitioner said, "I said this is a holdup. Hit the floor. I mean business and I'll make an example out of you." Petitioner then aimed his pistol at Ronald Felts, who was standing with several others near the pool table, and shot him through the head. Felts died of this wound.

Once the surviving patrons and employees were on the floor, petitioner directed the tavernowner, Ellen White, to open the cash register so that he could collect the money from behind the bar. While doing so, he fired a shot over the heads of White and the bartender, Randy Jenkins, and told White and Jenkins that they were coming with him; and the three walked to the end of the bar. Petitioner then forced Jenkins to lie back down on the floor and shot him in the head. Petitioner told White, "bitch, you're going with me. You're going to give me head," and shoved her out the door of the tavern. Petitioner forced White into the brown Ford station wagon he had been driving, but the car

got stuck on a curb as he attempted to drive away. White and petitioner went back into the tavern to get White's car keys. Upon re-entering, petitioner encountered fifteen-year-old Lori Spradling and threatened to kill her if she had called the police. Petitioner reminded Spradling and White that he had already killed once and would kill again. Petitioner then forced White back outside, fired a shot at a bystander in the process, and forced her into the driver's seat of her car, a 1973 Ford Torino. While driving petitioner away from the tavern, White complained that she could not see out of the frosted windows. She opened the car door, as if to look for traffic, and jumped out of the car and ran.

On Wednesday, January 4, at 12:30 a.m., petitioner drove up to the Coach Light Motel in Poplar Bluff. He entered the motel lobby, produced his pistol, and proceeded to rob the cashier, Mrs. Ollie Gaultney. Petitioner then told Mrs. Gaultney that she was coming with him, and

she resisted. Mrs. Gaultney's husband, roused by the commotion, came downstairs from their living quarters, and petitioner threatened him with his gun by saying, "I'll kill you. I've killed already tonight and I'll kill you." When petitioner again attempted to abduct Mrs. Gaultney, a struggle ensued between petitioner and Mr. Gaultney in which petitioner was eventually shoved outside and the door closed. Before petitioner drove away, Mr. Gaultney fired three shotgun blasts into the radiator of the car petitioner was driving. Later that morning, petitioner entered Junior's Food Mart in Corning, Arkansas, where he fired a shot into the ceiling, and demanded a car and a driver. Petitioner said, "I've done killed once tonight. Wouldn't bother me to do it again." One of the persons in the store pointed out his own vehicle and said the keys were in it. Petitioner went outside and started to drive away. As he was exiting the parking lot, the police stopped and arrested petitioner.

The Missouri Court of Appeals analyzed this claim and found it without merit. Kenley, supra, 759 S.W.2d at 349-50. Petitioner does not contend any circumstance precludes the application of the presumption of correctness, and this Court finds the state court's finding supported by the record.

Upon careful consideration of the record, the Court finds and agrees with the Missouri Court of Appeals that the evidence of deliberation was overwhelming as demonstrated by the evidence included in the trial transcript. Indeed, the record reflects at least two eyewitnesses, Sandra Buttry and Randy Jenkins, testified that petitioner acted deliberately in his actions and that he did not slur his speech or stagger. Thus, the choice not to develop evidence concerning petitioner's ability to premeditate on the day in question as a result of his alleged intoxication and/or drugged condition was reasonable under the circumstances. The Court consequently finds trial counsel's

performance was not deficient, and therefore the Court need not and will not address the prejudice prong of the Strickland test for constitutionally ineffective assistance of counsel.

Petitioner next alleges that trial counsel was ineffective in failing to object to the testimony of the decedent's widow concerning the fact that decedent had two children, and to testimony regarding numerous unrelated handguns in possession of the petitioner.

The Missouri Court of Appeals made findings concerning these claims on petitioner's appeal to the court from the denial of his 27.26 motion, by stating:

> Appellant also complains that the attorney failed to object to identification by the decedent's widow. Mrs. Felts identified as her husband the man pictured in previously-admitted Exhibit #3. Earlier, Exhibit #3 had been identified by a criminal investigator who photographed the victim at the Blue Moon. Mrs. Felts also mentioned she had two children. To mention of this was made on direct appeal or in either of the two Rule 27.26 motions tendered by

appellant. We understand that appellant does not assert this "error" independently, but only as part of the alleged mass of cumulative attorney error which he claims contributed to the ineffective representation. However, the only evidence that may have been inadmissible was that concerning the fact that the deceased had two children. State v. Baublits, 324 Mo. 1199, 27 S.W.2d 16, 19 (1930). In light of the overwhelming evidence against appellant, it is difficult to see any prejudice to appellant, considered alone or in conjunction with the rest of the alleged "inefficiencies" of the attorney's conduct of appellant's defense.

Appellant complains that evidence that he came to Lawrence Peal's house on January 1, 1984, with 17 handguns reached the jury. The objection was sustained as being unrelated to the crime and the state was directed to identify only the one weapon that was used. It is true that the attorney might have asked the court to strike the number of handguns from the record, but it is difficult to see how this omission prejudiced the appellant in any substantial way. The jury had already

> heard that appellant brought 17 handguns to the house. A motion to strike might just have drawn their attention to the number. Admittedly, the attorney's objection should have been made before the witness answered, but as a practical matter the answer may have come more quickly than expected or might have been unexpected. The record reflects the order in which the reporter took down the testimony and objections, it does not give us insight into whether or not the attorney attempted to object before the actual answer was given. The attorney stated the objection and grounds therefore [sic] in open court; the jury knew the impropriety of the introduction of that testimony.

Kenley, supra, 759 S.W.2d at 350 (emphasis in original). The above findings concerning counsel's failure to object to this testimony are entitled to the presumption of correctness in the related federal habeas proceeding established in 28 U.S.C. § 2254(d). Sumner, supra, 449 U.S. 539 (1981). Petitioner does not contend any circumstance precludes the application of the presumption of correctness, and the Court

finds that state court's findings supported by the record. Upon careful consideration of the record, the Court finds, in light of the overwhelming evidence of petitioner's guilt, petitioner suffered no Strickland prejudice.

Petitioner also alleges that trial counsel was ineffective during voir dire in failing to question the jury panel whether they would automatically impose a sentence of death after a finding of capital murder, i.e., trial counsel failed to "reverse Witherspoon."

The Rule 27.26 trial court considered this claim and held:

> The court concludes that failure to ask the "reverse Witherspoon" question is not indicative that the jurors were committed to giving the death penalty regardless of the circumstances. On the contrary, all jurors who were questioned stated they would base their decision as to whether or not to give the death penalty upon the facts and law as they were presented. Defendant has failed to sustain his burden of showing prejudice.

And see Kenley, supra, 759 S.W.2d at 352-53.

The findings by the state courts are entitled to the presumption of correctness established in 28 U.S.C. § 2254(d). Petitioner does not contend any circumstance precludes the application of the presumption of correctness, and this Court finds the state courts' findings supported by the record. Upon careful consideration of the record, the Court finds that the venire indicated that the veniremen would listen to the evidence and decide the case based upon the court's instructions and with reference to the facts and law, and consequently, trial counsel had no duty to ask a reverse Witherspoon question. The Court finds reasonable trial counsel's conduct under the circumstances. As a result of the Court not finding petitioner's trial counsel's performance deficient, the Court will not address the prejudice prong of the Strickland test.

Petitioner next alleges that trial counsel was ineffective during the punishment stage in

failing to submit and argue as a mitigating factor that petitioner had no significant history of prior criminal activity.

The Missouri Court of Appeals made the following finding when reviewing this claim:

> One of the mitigating circumstances recognized in § 565.032.3(1), RSMo 1986, is that "[t]he defendant has no significant history of prior criminal activity." The trial transcript indicates that appellant was convicted of the Class C felony of stealing and sentenced to a term of four years in the Missouri Department of Corrections. The attorney had submitted that fact as mitigating evidence but withdrew it prior to the penalty phase. The prosecution then submitted that evidence for the jury's consideration. The attorney's confusion as to its submission is apparent from the transcript and belies the explanation he offered at the hearing that he did not offer it as a mitigating circumstance to keep the prosecution from "harping" on that conviction. The prosecutor made it known to the attorney that if he did not offer it as a mitigating circumstance, the prosecutor would offer it into evidence himself.
>
> Even if the attorney

> should have submitted that mitigating circumstance, it is difficult to see how appellant was prejudiced. First, if appellant's concern is for the jury to know he only had one prior offense, that fact was brought out at trial. The fact that it was only a Class C felony of stealing was explicitly mentioned. Second, the instruction to the jury made them aware "You may also [in addition to the mitigating circumstance of age already submitted] consider any circumstances which you find from the evidence in extenuation or mitigation of punishment." The jury knew it could consider the lone prior offense in mitigation of appellant's punishment. Mo prejudice has been shown by appellant to have resulted from this omission if it was such.

Kenley, supra, 759 S.W.2d at 353-54. The Court finds the state court's prejudice analysis to be correct in light of the certified copy of the sentence and judgment being admitted into evidence and the jury being instructed that it could consider any circumstances which the jury could find from the evidence in extenuation or mitigation of punishment so that the jury knew it could consider petitioner's only prior

offense in mitigation of his punishment. Moreover, under the circumstances, the prosecutor would have been able effectively to rebut an allegation that petitioner had no significant prior criminal history in light of petitioner's prior conviction for a felony for which he served time with a significant prison term. Furthermore, the finding by the Missouri Court of Appeals is entitled to the presumption of correctness and this Court finds the state court's finding supported by the record. Upon careful examination of the record, the Court finds reasonable trial counsel's conduct and trial counsel's performance was not deficient.

Petitioner also alleges that trial counsel was ineffective in that, during the punishment stage of the trial, he failed to object to the prosecutor's argument which referred to a report not admitted into evidence, which the prosecutor had read, which indicated the death penalty was a deterrent to crime.

The Missouri Court of Appeals considered this claim of error and denied it.

The remarks were made in the following context:

> What I want you to consider is what happened in this country and that has happened in this country over the last ten or fifteen years that we have not had--not instated the death penalty. What has happened to us?
>
> You all have lived in our society during the last fifteen years. What's happened from the early sixties, the late fifties, to 1984? What happened in the years that we got soft on crime?
>
> And I think you're going to have to aqree with me, if you reflect at all, that our society has become a society where the cutthroats and the murders [sic in original] can do what they want.
>
> And we read it so often in the paper that it doesn't even bother us any more. We see blood and gore every day on TV and our children see it and they think that that's what life's all about now.
>
> Every man for himself. The man with the biggest gun wins. The man that shoots first wins and the losers are those people

> who are hurt and maimed and left lying dead on the floor.
>
> Now you might ask, "Is that the state of conditions as a result of us not having the death penalty?" And you might say, "We've had the death penalty all along." But have we?
>
> No. We have had individuals sentenced to death but there was not a conviction in this country since the late sixties until 1983. And what happened in 1983? What report came out about three days ago and showed us that violent crime dropped more than ten percent in 1983?
>
> When this society decides to get tough on crime and when this society decides that punishment must be sure, then we will not have to live in fear in our society any more.

It is generally true that counsel should refrain from arguing matters not in evidence. State v. Bailey, 526 S.W.2d 40, 43 (Mo. App. 1975). However, prosecutorial comment referring to facts not before the jury may be permissible, so long as it does not imply special knowledge of evidence pointing to a defendant's guilt. State v. Newlon, 627 S.W.2d 606, 617 (Mo. banc 1982), cert. denied, 459 U.S. 884, 103 S.Ct. 185, 74 L.Ed.2d 149, rehearing denied, 459 U.S. 1024, 103 S.Ct. 391, 74 L.Ed.2d 520 (1982). Moreover, the prosecutor may comment on the prevalence of crime, the necessity of law enforcement to deter crime, and the evil results which

> might befall society if a jury fails to perform its duty. State v. Hubbard, 659 S.W.2d 551, 558 (Mo. App. 1983). The prosecutor's final argument may exploit legitimate inferences which the evidence yields and the law allows the prosecutor wide latitude for comment. State v. Hodges, 586 S.W.2d 420, 427 (Mo. App. 1979).

Kenley, supra, 759 S.W.2d at 354-55.

The findings by the Missouri Court of Appeals are once again entitled to the presumption of correctness, and this Court finds the state court's findings supported by the record. Moreover, Missouri courts have found it to be permissible for a prosecutor to argue the deterrent effect of capital punishment and proper for the prosecutor to plea for strict law enforcement. See State v. Gilmore, 681 S.W.2d 934, 944 (Mo. banc 1984); Newlon, supra, 627 S.W.2d at 618-19. The Court consequently finds trial counsel's performance not deficient for failing to object to this argument.

Petitioner further alleges that trial counsel was ineffective as a result of counsel, during his own closing argument in the

punishment stage of trial, making a direct reference to petitioner's failure to testify.

In reviewing this claim, the Missouri Court of Appeals found the claim to be without merit. **See Kenley**, supra, 759 S.W.2d at 350. The Missouri Court of Appeals' finding is entitled to the presumption of correctness and this Court finds the state court's finding supported by the record. Upon careful examination of the record, the Court finds reasonable trial counsel's argument asserting that petitioner should not be condemned to die merely because he did not testify and trial counsel's performance was not deficient. Since the court has not found petitioner's trial counsel's performance deficient with respect to his conduct during closing argument in the punishment stage, the Court will not address the prejudice prong of the Strickland test.

In his final allegation of ineffective assistance of counsel, petitioner asserts that

at the punishment stage of his capital murder trial, his counsel was ineffective in failing to investigate and possibly present to the jury any possible mitigating evidence on his behalf concerning the medical, psychological, and psychiatric testimony and reports of psychiatric social worker, Lois Crownover, and child psychiatrist, Dr. Maria Manion, both of whom previously treated petitioner.

The Eighth Circuit Court of Appeals delineated the test for determining whether counsel is ineffective in not presenting any mitigating evidence as being "not whether there was no mitigating evidence, but rather, whether the lack of mitigating evidence was the result of adequate investigation and sound strategy." Laws v. Armontrout, 863 F.2d 1377, 1385 n.8 (8th Cir. 1988)(en banc), cert. denied, 109 S.Ct. 1944 (1989), reh. denied, 104 L.Ed. 1041 (1989). The appellate court further explained the test by stating:

the absence of mitigating evidence

> does not inexorably lead to a conlusion of ineffective counsel. One must look further and determine why the mitigating evidence was not produced. If counsel has through neglect failed to discover such evidence, then counsel will be found ineffective. If, however, counsel did not produce the mitiating evidence because, after a reasonable investigation and exercise of professional judgment, he has determined that withholding such evidence is the more strategically sound course, then there has been no ineffectiveness.

Id. at 1385. The court stressed in the **Laws** opinion that "it is not the failure to present mitigating circumstances, but rather the reasons for the failure to present mitigating circumstances, that are the proper subject for judicial scrutiny." Id. at 1386.

In describing the defense counsel's duty to investigate, the Strickland court explained:

> counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. . . . And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See United States v. Decoster, [199 U.S. App. D.C. 359], 372-373, 624 F.2d [196], 209-210 [(en banc), cert. denied, 444 U.S. 944 (1979)].

Id. at 691. In particular, the reasonableness of a decision not to investigate depends upon the strategic choices and information provided by the defendant to his counsel.

In determining whether counsel's performance was deficient, petitioner must show that counsel's representation fell below an objective

standard of reasonableness, considering all the circumstances. Laws, supra, 863 F.2d at 1387. Judicial scrutiny of counsel's performance must be highly deferential in light of the wide latitude counsel must have in making tactical decisions. The court must further "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy."' Id. at 1387 (quoting **Strickland**, supra, 466 U.S. at 689).

Applying these standards to this case, and presuming the state courts' factual findings are correct, the Court is compelled to conclude that petitioner received effective assistance of counsel in light of the Eighth Circuit's decision in Laws.

Generally, petitioner asserts that his trial counsel failed adequately to investigate and develop his past psychiatric treatment

record as demonstrated by counsel's failure to discover petitioner's military records. Petitioner claims that presentation of his psychiatric background might have produced a different result.

The Rule 27.26 court found as fact the following:

> The final complaint of Movant is that his counsel failed to produce mitigating evidence in the sentencing stage of the trial. In this regard, he refers to evidence by Mrs. Lois Crownover and Dr. Maria Manion. The sum total of Mrs. Crownover's testimony would be that as a young boy between the ages of 11 years and 15 years, the defendant had been aggressive, hostile and not functioning in the classroom and as a result of such conduct, he had been expelled from school. The testimony of Dr. Manion would have been that as a teenager the defendant would go into a state of uncontrollable rage, that he was extremely defensive, difficult to work with, not communicative, expressed negative and hostile feelings toward his family, especially his father; that he had only really shown any improvement while on medication in an institutional situation. Neither Dr. Manion's nor Mrs. Crownover's testimony would conclusively show that the defendant was suffering from any mental disease or defect. A jury could have reasonably con-

> cluded from their testimony that the defendant was an extremely vicious and dangerous personality, capable of having killed the victim in cold blood and having little regard for the feelings or concerns of other individuals or society in general. The counsel, in making a strategic decision not to call these witnesses, cannot be held to have violated his duty toward his client or be charged with ineffective assistance of counsel.

In reviewing the findings of the Rule 27.26 court, the Missouri Court of Appeals affirmed and found against petitioner. See Kenley, supra, 759 S.W.2d at 344-48.

This Court finds that trial counsel's decision to not further investigate and present psychiatric evidence was based on a reasonably thorough investigation into petitioner's character and into other information potentially relevant to mitigating circumstances. Although the record is devoid of counsel's investigation of petitioner's military background for purposes of the punishment stage at trial, this Court believes that the record reveals that counsel acted within the bounds of professional

competency under the circumstances. After reviewing Ms. Crownover's documentation of her involvement with petitioner and discussing Dr. Parwatiker's report with Dr. Wiscowski for over a period of six hours, trial counsel made the reasonable decision that petitioner's interests would not be served by developing and presenting this type of evidence. The Supreme Court in Strickland decided that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. at 690-91. The state courts' findings of fact are entitled to a presumption of correctness as established under 28 U.S.C. § 2254(d), and the Court accepts the state courts' legal conclusion of effectiveness based on those facts.

The Court has given due deference to counsel's performance in light of the wide latitude counsel must have in making tactical decisions as outlined in Strickland. The Court also notes

that the introduction of evidence in both the guilt and punishment phases of a capital case, like the selection of witnesses to be called, is a question of trial strategy that may not support a finding of ineffective assistance of counsel, even if later shown to be wrong.

The following Laws case passed through this Court. Laws v. Armontrout, 834 F.2d 1401 (8th Cir. 1987), vacated and iudgment reversed en banc, 863 F.2d 1377 (1988), cert. denied, 109 S.Ct. 1944 (1989). This Court found ineffective assistance of counsel in the punishment phase. The panel reversed this Court two to one, and the full court considered this matter en banc and reversed this Court six to four. Based on the facts of that case, this Court believes it is virtually impossible to find ineffective assistance of counsel in the Eighth Circuit. At least this Court believes it may be impossible for the court of appeals to find it.

Based on the available record and the deferential standard of review, the Court finds

trial counsel's decision not to present mitigating evidence in this case was an informed and reasoned judgment. Counsel could have concluded that the decision to present psychological testimony would have damaging results because the rest of the damaging testimony would also be available. Furthermore, Dr. Parwatiker's results of the psychiatric evaluation of petitioner would be admissible on cross-examination to refute any testimony that petitioner was disturbed and mentally ill. The findings contained in Dr. Parwatiker's report that petitioner did know and appreciate the nature and wrongfulness of his conduct and was capable of conforming his conduct to the requirements of law, were potentially more damaging than the scant mitigating evidence available as noted by the state courts. Moreover, in view of the fact that counsel observed petitioner to be coherent and exhibiting no erratic behavior while working with him on the case, counsel's decision not to raise

petitioner's mental state as a mitigating factor at trial is further supported.

The Court concludes that under Strickland, counsel conducted an adequate investigation into the possibility of presenting evidence concerning petitioner's psychological and psychiatric background. In view of the fact that the evidence did not support a conclusion that petitioner had a mental disease or defect, counsel was not obligated to investigate further into petitioner's psychological background. Counsel's performance with respect to this decision cannot be considered deficient under the circumstances, and petitioner has failed to overcome the presumption that, under the circumstances, the challenged decision might be viewed as sound trial strategy. Petitioner has therefore failed to satisfy the first part of the Strickland test by failing to show his trial counsel's performance fell below an objective standard of reasonableness.

In light of the foregoing, petitioner's request for habeas relief of his capital murder conviction will be denied on the merits. To the extent respondent's objections to petitioner's exhibits remain pending, those objections will be denied without prejudice.

Dated this day of July, 1989.

WILLIAM L HUNGATE
UNITED STATES DISTRICT JUDGE

91-483

Supreme Court, U.S.
FILED
SEP 23 1991
OFFICE OF THE CLERK

No. 91-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PAUL DELO, Superintendent,
Potosi Correctional Center,

Petitioner,

vs.

KENNETH L. KENLEY,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Volume II

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

PAUL DELO, Superintendent, Potosi Correctional Center, Petitioner,	)	
vs.	)	No. 91-_____
KENNETH L. KENLEY, Respondent.	)	

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8. Direct-appeal Opinion, **State of Missouri v. Kenneth Lee Kenley**, No. 66252 (Missouri Supreme Court) — A-122

9. "Findings of Fact, Conclusions of Law, and Judgment," **Kenneth Kenley v. State of Missouri**, Nos. CV186-91CC and CV186-92CC (Circuit Court of Butler County, Missouri) — A-138

10. State post-conviction appeal opinion, **Kenneth Kenley v. State of Missouri**, Nos. 15022 and 15024 (Consolidated) (Missouri Court of Appeals, Southern District) — A-145

11. "Amended Order" denying rehearing by the United States Court of Appeals for the Eighth Circuit, Nos. 89-2915EM and 90-1015EM, **Kenneth L. Kenley v. Bill Armontrout**, filed August 13, 1991 — A-213

12. Pro Se "Petition" for Writ of Habeas Corpus filed by Kenneth L. Kenley in Cause No. 88-2298C(3) — A-215

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

KENNETH L. KENLEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 88--2298C(3)
	)	
BILL ARMONTROUT,	)	
Respondent.	)	

ORDER

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that the amended petition for writ of habeas corpus of his capital murder conviction filed by Kenneth Lee Kenley pursuant to 28 U.S.C. § 2254 is denied on its merits.

IT IS HEREBY FURTHER ORDERED that, to the extent they remain before the Court, respondent's objections to petitioner's exhibits are denied without prejudice.

IT IS HEREBY FURTHER ORDERED that the stay of execution entered on May 3, 1989, is extended from August 7, 1989, to October 7, 1989.

Dated this 12th day of July, 1989.

*****ILLEGIBLE SCRAWL*******
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

KENNETH L. KENLEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 88-2298C(3)
	)	
BILL ARMONTROUT,	)	
	)	
Respondent.	)	

ORDER

This matter is before the Court on the petition of Kenneth Lee Kenley for writ of habeas corpus of his capital murder conviction pursuant to 28 U.S.C. Section 2254.

The issues having been duly presented and considered; a decision having been rendered; and finding pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that there is no just reason for delay of entry of a final judgment as to petitioner's writ of habeas corpus of his capital murder conviction.

IT IS HEREBY ORDERED that the Clerk of the Court is directed to enter a final judgment as

to petitioner's writ of habeas corpus of his capital murder conviction.

Dated this 12th day of July, 1989.

(s) William Hungate
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

KENNETH L. KENLEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cause No. 88-2298C(3)
	)	
BILL ARMONTROUT,	)	
	)	
Respondent.	)	

JUDGMENT

The issues in this case having come before the Court, the Honorable William L. Hungate, District Judge, presiding, on the petition of Kenneth L. Kenley for writ of habeas corpus of his capital murder conviction; the issues having been duly presented and considered; and a decision having been rendered,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that petitioner Kenneth Kenley take nothing by his writ of habeas corpus of his capital murder conviction against respondent Bill Armontrout, and the same is dismissed without prejudice.

Each party shall bear its own costs.

EYVON MENDENHALL, CLERK

BY: (s) Lisa Kollasch
Deputy Clerk

Dated this 14th day
of July, 1989.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

KENNETH L. KENLEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cause No. 88-2298C(3)
	)	
BILL ARMONTROUT,	)	
	)	
Respondent.	)	

PETITIONER'S MOTION TO ALTER OR AMEND A JUDGMENT OR, IN THE ALTERNATIVE, TO RECONSIDER THE COURT'S ORDER OF JUNE 12, 1989, DENYING PETITIONER'S AMENDED PETITION FOR WRIT OF HABEAS CORPUS ON HIS MURDER CONVICTION

Comes now petitioner, Kenneth L. Kenley, and, pursuant to Rule 59, Federal Rules of Civil Procedure, respectfully moves this Court to alter or amend the Judgment on his amended petition for write of habeas corpus on his capital murder conviction in favor of petitioner and against respondent. In the alternative, petitioner moves this Court to reconsider its Order of June 12, 1989, denying petitioner's amended petition for writ of habeas corpus on his murder

conviction. And as for said motion, petitioner states as follows:

1. The Court erred in failing to grant petitioner's petition for writ of habeas corpus on his capital murder conviction.

. . . 11-22-89 Denied

Endorsed denied WLH 11-22-89.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

KENNETH L. KENLEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cause No. 88-2298C(3)
	)	
BILL ARMONTROUT,	)	
	)	
Respondent.	)	

ORDER

This matter is before the Court on petitioner's application for certificate of probable cause for capital conviction, for leave to proceed on appeal in forma pauperis, and notice of appeal, filed November 27, 1989.

Finding the record satisfies the relevant prerequisites for issuance of a certificate of probable cause; finding a petitioner was granted leave to proceed before this Court in forma pauperis; and finding the appeal is taken in good faith,

IT IS HEREBY ORDERED that petitioner's application for certificate of probable cause for

capital conviction is granted and a certificate of probable cause for appeal in the habeas case is issued.

IT IS HEREBY FURTHER ORDERED that petitioner's application to proceed on appeal in forma pauperis is granted.

(s) William L. Hungate
UNITED STATES DISTRICT JUDGE

Dated: 11-27-89

SUPREME COURT OF MISSOURI

en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. 66252
	)	
KENNETH LEE KENLEY,	)	
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF BUTLER COUNTY

Honorable John C. Holstein, Judge

Defendant was convicted of capital murder (Sec. 565.001 RSMo 1978 repealed October 1, 1984, now first degree murder Sec. 565. 020 RSMo Cum. Supp. 1984) and sentenced to death. Because of the punishment imposed original appellate jurisdiction is in this court. Mo. Const. Art. V, Sec. 3. Pursuant to the mandate of Sec. 565.014 RSMo 1978 (now Sec. 565.035 RSMo Cum. Supp. 1984) we review both the errors asserted and the sentence imposed. We affirm.

On January 1, 1984, Defendant came to the home where he was residing with a large number of handguns. He kept one of these, a silver .38

caliber pistol. The next day he purchased some .38 hollow point ammunition and with a friend practiced with the pistol by shooting at cans and trees. On January 3 at approximately 11:00 p.m. Defendant borrowed a brown Ford station wagon from his host and drove to the Kater Inn Package Store in Poplar Bluff. He entered the store with his pistol and threatened to kill the salesman unless the cash register money was given to him. The money was given to him. While this was transpiring a female customer, Sandra Buttry, entered the store and was ordered to lie on the floor. Upon completion of the robbery Defendant grabbed Ms. Buttry's arm and forced her to leave with him. Once outside he pointed his pistol at Ms. Buttry's male companion, forced Ms. Buttry into the Ford station wagon and drove away. Upon Ms. Buttry's inquiry as to why he had taken her, Defendant stated he was "going to get a piece of ass." He then ordered Mrs. Buttry to perform fellatio on him. She opened the car door and jumped out of the

car but was shot in the back by Defendant as she exited the car. As she was receiving assistance by a passing motorist Defendant drove hack to where she was and then proceeded to the South. Ms. Buttry's wound was not fatal.

Approximately half an hour later Defendant entered the Blue Moon Tavern in Poplar Bluff and announced to the eight persons inside, "This is a holdup. Everyone hit the floor." When the people in the tavern did not immediately respond Defendant stated, "I said this is a holdup. Hit the floor. I mean business and I'll make an example out of you." He then aimed his pistol at Ronald Felts, one of four people standing near a pool table, and from a distance of approximately 10 feet shot Felts
through the temple. Felts died virtually instantaneously. With the occupants on the floor Defendant ordered the tavern owner, Ms. White, to open the cash register. He then proceeded to the back of the bar to collect the money and while there fired a shot over the heads of Ms.

White and the bartender, Randy Jenkins. After collecting the money he ordered White and Jenkins to leave with him, but when they reached the end of the bar Defendant ordered Jenkins to the floor and shot him in the jaw. Jenkins recovered from the wound. Defendant then stated to White, "Ritch, you're going with me. You're going to give me head." In attempting to leave Defendant got the Ford station wagon stuck on the curb, so he and Ms. White returned to the tavern to get her keys. There he threatened to kill a fifteen year old girl if she had called the police, stating that he had already killed once and would do it again. Defendant and Ms. White then entered her vehicle. Defendant fired a shot at a bystander and the automobile left with Ms. White driving. Through a ruse she managed to open the car door, jumped out and ran back toward the tavern. Defendant got control of the car and drove on.

In less than half an hour Defendant entered the Coachlight Motel in Poplar Bluff and after

robbing the proprietor at gunpoint ordered her to leave with him. Her husband, who had been sleeping, entered the room and Defendant stated, "I'll kill you. I've killed already tonight and I'll kill you." A struggle between Defendant and the husband ensued which resulted in Defendant being pushed out the door. During their struggle the pistol held by Defendant and pointed at the husband "clicked" but did not fire. Sometime later that morning Defendant entered Junior's Food Mart in Corning, Arkansas, and, after firing a shot into the ceiling, demanded a car and driver. He stated, "I've done killed once tonight. Wouldn't bother me to do it again." Somebody in the store pointed out his own car and told Defendant the keys were in it. Defendant drove away in that car and was arrested as he left the parking lot. Defendant offered no evidence. He was 23 at the time of the offense and had one felony conviction for a Class C Felony of Stealing for which he served

three years in prison. He submitted only his age as a mitigating factor.

Defendant first premises error upon the failure of the trial court to sustain his motion in limine to prevent introduction of the other crimes committed on the night of the murder and in allowing introduction of such evidence. No objection was interposed to the evidence at the time it was offered at trial despite the trial judge's admonition that he would expect such objections and would decide on admissibility on an item to item basis. Such an objection is required to preserve the matter for appellate review as a ruling in limine is interlocutory only and is subject to change at the time the evidence is offered. State v. Woods, 639 S.W.2d 818 (Mo. 1982) [3]. Because of the seriousness of the sentence imposed we will review the matter under plain error. State v. Gilmore, 681 S.W.2d 934 (Mo. banc 1984) l.c. 941. The testimonial and physical evidence of Defendant's guilt was overwhelming.

As a general rule evidence of uncharged crimes is inadmissible unless that evidence has a "legitimate tendency to establish defendant's guilt of the crime charged." Such evidence becomes admissible when it tends to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) common scheme or plan embracing the commission of two or more crimes so related that proof of one tends to establish the other, or (5) identity. State v. Williams, 652 S.W.2d 102 (Mo. banc 1983) [9]. It is the burden of the prosecution to prove to the satisfaction of the jury every element of the crime beyond a reasonable doubt and the state "should not be unduly limited as to the manner of satisfying this quantum of proof." State v. Clemons, 643 S.W.2d 803 (Mo. banc 1983) [1-3]. The trial court is in the best position to evaluate whether the potential prejudice of relevant evidence outweighs the relevance. State v. Shaw, 636 S.W.2d 667 (Mo. banc 1982) [6] .

It was the state's burden here to convince the jury that Defendant killed Felts unlawfully, willfully, knowingly, deliberately, and with premeditation. Although Defendant's conduct and statements at the time he shot Felts may have sufficed to establish those elements sufficiently to withstand a motion for directed verdict we cannot say they were sufficient alone to convince a jury. Mental state, in this case deliberation and premeditation, is rarely capable of direct proof. State v. Flynn, 541 S.W.2d 344 (Mo. App. 1976) [2,3]. Findings of deliberation and premeditation depend usually "upon an inference reasonably drawn from the evidence and circumstances surrounding the act." State v. Wood, 596 S.W.2d 394 (Mo. banc 1980) [7,10]; State v. Zeitvogel, 655 S.W.2d 678 (Mo. App. 1983) [20]. Defendant's conduct in acquiring a gun and bullets, practicing with the gun, setting out on a continuing crime spree in which he robbed business establishments and kidnapped women for sexual purposes, evidences a common

scheme or plan pointing to Defendant as the participant in the robbery which resulted in Felts' death. His shooting of Ms. Buttry followed by his almost immediate robbery of the Blue Moon and shooting of Felts and Jenkins, was evidence of a cool state of mind and that the act of shooting Felts was "performed as a free act of the will, ... not under the influence of a violent passion suddenly aroused by some provocation." State v. Zeitvogel, supra. His subsequent robberies and his statements that he had killed earlier and would kill again are also indicative of a deliberative state of mind. State v. Wood, supra, [11]. His statements are also admissions identifying Defendant as the murderer of Felts. Conduct before and after the commission of the charged crime is relevant where it relates to the elements of the charged crime. State v. Williams, supra, [10]; State v. Shaw, 636 S.W.2d 667 (Mo. banc 1982) [5-7]; State v. Greathouse, 627 S.W.2d 592 (Mo. 1982)

[6]. We find no error in the admission of the evidence complained of.

Defendant next challenges the finding of the jury that two aggravating circumstances were present. The aggravating circumstances found were (1) the murder was committed for purposes of receiving money and (2) that by his act of murdering Felts Defendant knowingly created a great risk of death of more than one person in a public place. Finding at least one aggravating circumstance is a threshold requirement before the jury can recommend the death penalty. Sec. 565.008 RSMo 1978; State v. Shaw, supra, [11-13]. Where more than one aggravating circumstance is found, on review we "need only determine whether as a matter of law and fact, one of the aggravating circumstances is applicable. State v. Johns, 679 S.W. 2d 253 (Mo. banc 1984 [32]. "[T]he failure of one circumstance does not taint the proceeding so as to invalidate the other aggravating circumstance found

and the sentence of death thereon." State v. LaRette, 648 S.W.2d 96 (Mo. banc 1983) [4,5].

The murder for money circumstance has been held applicable to a murder committed during the course of a robbery. State v. McDonald, 661 S.W. 2d 497 (Mo. banc 1983) [11,12]; State v. Lashley, 667 S.W.2d 712 (Mo. banc 1984) [9]; State v. Johns, supra, [33, 34]. The statutory language establishing that aggravating circumstance does not limit its application to a killing of the person from whom the money is sought. Sec. 565.012(4) RSMo 1978. The evidence clearly establishes that the killing of Felts occurred during and as a part of a robbery. It is an even clearer case than McDonald for here the killing was utilized to obtain the money initially. This aggravating circumstance was properly submitted to and found by the jury. It is unnecessary therefore for us to review the second aggravating circumstance found by the jury.

Defendant contends that he was convicted by a death-qualified jury and thereby denied a fair

and impartial jury. He relies upon Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) to support this assignment of error. We reject the contention for several reasons. Initially, we have previously rejected the same contention. State v. Johns, supra, [24,25]. Secondly, while we are bound by the decisions of the United States Supreme Court, we need not follow lower federal courts. Rodgers v. Danforth, 486 S.W.2d 258 (Mo. banc 1972) [3,4]. We not only find Grigsby v. Mabry, supra, unpersuasive, we also find it contrary to virtually all other decisions on the same issue and to Wainwright v. Witt, ___ U.S. ___, 105 S.Ct. 844 (1985) handed down one week prior to Grigsby. Thirdly, in the case before us three veniremen were excused for cause not because they could not impose the death penalty but because they stated they could not return a verdict of guilty in a case where the punishment included the death penalty. Even under the Grigsby case these three veniremen were ineligible to serve as jurors on any aspect of the

case. Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) n. 21; Wainwright v. Witt, supra.

Pursuant to Sec. 565.014(3) RSMo. 1978 (now 565.035 RSMo. Cum. Supp. 1984), we are required to determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." In such a review we look to the facts of the homicide here as compared to similar homicides. We determine these facts from the entire record and transcript and from the trial judge's report. State v. Lashley, supra, [8].

We find this case similar to State v. Newlon, 627 S.W.2d 606 (Mo. banc 1982); State v. McDonald, supra; State v. Lashley, supra, and State v. Johns, supra, in all of which the capital murder was committed during the course of a robbery. Here, as in those cases, the killing occurred without provocation or resistance by the victim. In this case the victim was not

even the person being robbed but a bystander who was executed to establish Defendant's control of the scene. The killing was without warning, was senseless and was a killing for the sake of killing. Consideration of the Defendant shows a man who commenced a night of life-threatening criminal activity which included four robberies, three attempted kidnappings, two attempted sexual assaults, and assorted additional felonies. Defendant prepared himself for this crime spree by practicing his marksmanship and acquiring a particularly life-threatening type of ammunition. It is apparent that he embarked upon his activities with a full intention to kill. By happenstance only one person was killed, but Defendant wounded two others by shooting them in places which could have caused death and attempted to shoot two other people. Only by good fortune are we dealing with one tragic murder and not five. Subsequent to killing Felts Defendant showed no remorse and in essence bragged on three occasions during that night about that

killing. The report of the probation office prepared after trial and before sentencing and the report of mental examination (both attached to the report of the trial court) indicate that Defendant has a most cavalier attitude toward human life, has engaged in frequent assaultive and violent behavior, has no reluctance to kill for the most insignificant of reasons, and would kill again if given the chance. We find that the penalty imposed was not influenced by passion, prejudice or any other arbitrary factor, was supported by at least one aggravating circumstance, and was neither excessive nor disproportionate when compared to similar cases considering both the crime and the Defendant.

Judgment of conviction and sentence of death affirmed.

Gerald M. Smith, Special Judge

Rendlen, C.J., Higgins, Billings, Blackmar and Welliver, JJ., concur; Donnelly, J., concurs in result. Gunn, J. not sitting.

IN THE CIRCUIT COURT OF BUTLER COUNTY, MISSOURI
CIRCUIT DIVISION

KENNETH KENLEY,	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No. CV186-91CC
	)	CV186-92CC
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Now on this day, the court having considered the Rule 27.26 Motion of Movant and having taken said cause under advisement and having considered the Memorandums of Law of Movant and Respondent, the court makes the following Findings of Fact, Conclusions of Law, and Judgment:

Movant's sole complaint before the court is ineffective assistance of counsel. In support of his position, Movant alleges that his counsel at the time he first began to represent the Movant had only been admitted to practice law for nine months. As a result of this

inexperience, Movant argues that his counsel failed to request a change of venue, failed to cross examine witnesses, failed to object to evidence of other crimes, failed to develop a theory of defense, failed to voir dire the jury by asking a "reverse Witherspoon" question, and failed to produce mitigating evidence at the sentencing phase of the trial on defendant's psychological history.

The Movant cites no authority suggesting that the complained of actions amount to ineffective assistance of counsel except on the last two points, i.e., failure to properly voir dire the jury by asking a "reverse Witherspoon" question and failure to produce mitigating evidence at the sentencing stage of the trial.

The bench mark for judging any claim of ineffective assistance of counsel must be whether the counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Strickland v. Washington,

466 US 688, 80 L.Ed.2d 674, 104 S Ct 2052. In addition, defendant must show that deficient performance prejudiced the defense to such an extent that the defendant was denied a fair trial. Strickland v. Washington, supra, and Laws v. State, 708 S.W.2d 182.

In the first point of Movant's brief, he alleges ineffective assistance of counsel by failure to request a change of venue. No evidence was produced showing that the defendant could not

obtain a fair trial in Butler County. The record clearly reflects that the defendant was aware of his right to a charge of venue and affirmatively waived his right to a change of venue after conferring with counsel. Under such circumstances it has been held not to result in ineffective assistance of counsel. Coleman v. State, 621 S.W.2d 357. Movant's complaint that counsel failed to cross-examine witnesses is not supported by any evidence that the testimony of those witnesses would have produced any

inconsistencies, contradictions or other items of impeachment of value to the defendant's case. As noted above, the defendant has the burden of showing prejudice. Movant's complaint that his attorney had failed to properly object to evidence of other crimes also was not prejudicial to defendant. The evidence of other crimes was considered by the trial court on the Motion For New Trial, as well as by the Appellate Court on review of the case. The evidence of other crimes was held to be admissible at both the trial court level and by the Appellate Court. State v. Kenley 693 S.W.2d 79. Thus, no prejudice occurred as a result of any failure to make such an objection.

Movant's complaint that his counsel failed to develop any theory of defense or make an opening statement is, again, unsupported by evidence of any logical theory of defense which might have been available to the defendant. As noted by the

Missouri Supreme Court in reviewing the underlying case, the
evidence of the defendant's guilt was "overwhelming."

The court concludes that failure to ask the "reverse Witherspoon" question is not indicative that the jurors were committed to giving the death penalty regardless of the circumstances. On the contrary, all jurors who were questioned stated they would base their decision as to whether or not to give the death penalty upon the facts and law as they were presented. Defendant has failed to sustain his burden of showing prejudice.

The final complaint of Movant is that his counsel failed to produce mitigating evidence in the sentencing stage of the trial. In this regard, he refers to evidence by Mrs. Lois Crownover and Dr. Maria Manion. The sum total of Mrs. Crownover's testimony would be that as a young boy between the ages of 11 years and 15 years, the defendant had been aggressive,

hostile and not functioning in the classroom and as a result of such conduct, he had been expelled from school. The testimony of Dr. Manion would have been that as a teenager the defendant would go into a state of uncontrollable rage, that he was extremely defensive, difficult to work with, not communicative, expressed negative and hostile feelings toward his family, especially his father, that he had only really shown any improvement while on medication in an institutional situation. Neither Dr. Manion's nor Mrs. Crownover's testimony would conclusively show that the defendant was suffering from any mental disease or defect. A jury could have reasonably concluded from their testimony that the defendant was an extremely vicious and dangerous personality, capable of having killed the victim in cold blood and having little regard for the feelings or concerns of other individuals or society in general. The counsel, in making a strategic decision not to call these witnesses, cannot be held to have violated his

duty toward his client or be charged with ineffective assistance of counsel.

While other complaints of ineffective counsel were raised, no evidence was produced indicating the defendant was prejudiced by the conduct of counsel.

WHEREUPON, the court specifically finds that the defendant was not denied effective assistance of counsel as required by the Sixth Amendment. It is, therefore, ORDERED, ADJUDGED and DECREED that the motion of Movant, pursuant to Supreme Court Rule 27.26 be denied and the same hereby is denied.

Dated this 18th day of November, 1986.

JOHN C. HOLSTEIN, Circuit Judge

IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT
DIVISION TWO

KENNETH KENLEY,	)	
	)	
Defendant-Appellant,	)	
	)	
vs.	)	Nos. 15022 and 15024 Consolidated
	)	
STATE OF MISSOURI,	)	
	)	
Plaintiff-Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF BUTLER COUNTY

Honorable John C. Holstein, Special Judge

AFFIRMED

PER CURIAM: Following jury trial appellant was convicted of capital murder and received the death penalty. The conviction and sentence were affirmed on appeal. State v. Kenley, 693 S.W.2d 79 (Mo. banc 1985), cert. denied, 475 U.S. 1098, 106 S.Ct. 1500 (1986). In a separate trial appellant was convicted of three counts of robbery in the first degree, two counts of kidnapping, two counts of assault in the first degree and one count of stealing. These convictions

were also affirmed on appeal. State v. Kenley, 701 S.W.2d 185 (Mo.App. 1985), cert. denied, 106 S.Ct. 1500 (1986).

Appellant thereafter sought post-conviction relief by filing two Rule 27.26 motions. They were consolidated for hearing and after the hearing the trial court made findings of facts, conclusions of law and entered judgment denying the motions. This appeal is still governed by Rule 27.26 as the sentences were pronounced and the motions filed before January 1, 1988. Rule 29.15(m). This court has jurisdiction of the appeal. Mercer v. State, 666 S.W.2d 942, 944 (Mo.App. 1984).

Appellant has briefed seven assignments of error, all alleging the ineffective assistance of counsel both at the capital murder trial and at the robbery, kidnapping, stealing and assault trial (hereinafter the "non-capital trial"). Our primary inquiry is whether the record reveals that (1) trial counsel failed to exercise that degree of skill, care and diligence to be

expected of a reasonably competent attorney under similar circumstances, and (2) appellant was prejudiced by trial counsel's performance. Strickland v. Washington, 466 U.S. 668, 693, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674 (1984), rehearing denied, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984); Seales v. State, 80 S.W.2d 733, 736 (Mo. banc 1979); Bannister v. State, 726 S.W.2d 821, 824 (Mo.App. 1987), cert. denied, ___ U.S. ___, 107 S.Ct. 3242, 97 L.Ed.2d 747 (1987). The required prejudice is shown if the record reflects a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. at 634. With this in mind, we shall examine appellant's contentions and review the facts of record as the need arises.

Appellant first assigns error to the hearing court in finding there was no ineffective

assistance of counsel because of counsel's alleged failure to investigate and present psychiatric evidence which appellant contends could have resulted in life imprisonment. He claims the court's finding that there was a viable "strategic decision" not to seek out this mitigating evidence was clearly erroneous. The evidence which appellant proclaims could reasonably have persuaded a jury to impose a life sentence instead of the death penalty consists of the testimony of two persons: Dr. Maria Manion, a medical doctor specializing in child psychiatry, and Lois Crownover, a retired school social worker at the Poplar Bluff public school system where appellant attended school until he was 15 or 16 years old. Appellant asserts that these witnesses could have provided testimony and evidence concerning his genetic background, turbulent and abused family history, and psychiatric record including evidence that his condition was capable of improvement.

Ms. Crownover first became acquainted with appellant when he was eleven years old when his school principal had asked her to intervene. At that time appellant was having "great difficulty getting along" and was "overly aggressive, hostile, and was not functioning in the classroom." Upon those observations, she made her initial referral to the diagnostic regional center in Poplar Bluff, Missouri. Thereafter, appellant was hospitalized twice in Farmington State Hospital and once in Lutheran Hospital, upon the basis of Ms. Crownover's referral.

Appellant had been living with his father and grandmother. He was "extremely overly active" and his father described episodes of his fainting. After being evaluated at the diagnostic clinic initially, though not seen by a psychiatrist, appellant returned to school and Ms. Crownover was given instructions as to how to work with him. Ms. Crownover described some of appellant's problems: he was, at age eleven, still enuretic (a bed wetter), he was not

achieving to the full potential revealed by his intelligence scores, and he would go into "wild rages", screaming, crying and kicking. Finally, at age fifteen, the school principal asked the Farmington Hospital to declare that appellant required homebound teaching because he was fearful for the safety of the teachers and other children. A homebound teacher was assigned to him. Thereafter, appellant was placed in a school for severely behavioral disordered children, but that alternative was unsuccessful and Ms. Crownover eventually referred him to Dr. Maria Marion who hospitalized him at the age of sixteen in the Lutheran Hospital in St. Louis.

While appellant was under Ms. Crownover's counselling, he was taking medication, prescribed by the Farmington Hospital, which restored some measure of self-control. Ms. Crownover described the relationship between appellant and his father as "angry" and the only way his father could control him (as a child) was through creating fear in him, but this

became unsuccessful as appellant grew older. Appellant's father was an extremely nervous man who was illiterate, and suffered a severe speech impediment. Movant's grandmother, in her seventies, "adored Kenneth" and "did everything that she could in her power for him", though Ms. Crownover suspected appellant abused her as well as his father.

The office of appellant's criminal trial counsel requested from Ms. Crownover documentation of her involvement with appellant. These documents described appellant's behavior, his social history, the referrals made, and his various problems. Ms. Crownover sent the documents to the attorney's office, along with Dr. Manion's address. Thereafter, trial counsel contacted her, relating that he had received the documents, that the information gave him insight into his client, and that he appreciated her cooperation. She was not contacted by the attorney or his office again. At the time of trial Ms. Crownover's reports were at least six

years old. Ms. Crownover also sent documentation of her involvement with appellant to the Fulton State Mental Hospital when Dr. Parwitaker was performing a psychiatric evaluation of appellant to determine mental defect per Chapter 552, RSMo, 1986.

Dr. Maria Manion admitted appellant to Lutheran Hospital on November 24, 1975, and discharged him on February 23, 1976. Throughout this time Dr. Manion was involved in psychiatric-psychological studies of appellant. She prescribed an antidepressant drug for appellant, commonly used in the treatment of mentally ill patients, and he responded favorably to it. During his hospitalization appellant was subjected to a variety of tests, including an electroencephalograph (EEG) (a recording of the electricity the brain produces), the results of which were abnormal. Dr. Manion said that the brain pattern could be altered due to many factors and that an EEG is **not** conclusive as a diagnosis of brain abnormality. The abnormal

EEG was consistent with appellant's developmental delays, such as his enuresis, and his "temper tantrums". In a medical report, the doctor cautioned that "the findings were not conclusive or correlated with a convulsive disorder".

Dr. Manion remarked on appellant's genetic background and noted that his father had a chronic mental illness for which he had been hospitalized several times. Predisposition (genetics), an abnormal EEG, enuresis, and a non-nurturing environment indicated the genesis of appellant's violent temperament. However, there was never an indication that appellant was abused at home. Dr. Manion's opinion was that appellant was unable to cope with frustration and stress. She expressed the opinion that, if he had continued treatment, appellant "would be improved". Dr. Manion was never contacted by appellant's criminal trial attorney or his office.

After receiving the documentation of appellant's psycho-social history from Ms. Crownover,

the attorney requested the court to order a mental examination be conducted at Fulton State Mental Hospital. The examination was so ordered and subsequently performed. After he received the report from Dr. Parwitaker at Fulton, the attorney spoke with Dr. Maria Wiscowski for approximately six hours about different aspects of the case and appellant's behavior. From the second week in January until the trial in June, the attorney was in daily contact with appellant and was alert to any abnormalities which might signal the need for another mental examination.

The attorney testified that he did not utilize Ms. Crownover as a witness in the sentencing phase because he believed Dr. Parwitaker's report to be fairly conclusive and damaging to the case. If he had called Ms. Crownover to testify, her six-year-old information could be refuted based on the much more recent report of Dr. Parwitaker and the state "would try to cut that to ribbons". The

attorney said he did not utilize Dr. Manion's testimony, for substantially the same reasons.

While working with appellant on the case, the attorney observed him to be "very coherent" and exhibited no erratic behavior. They discussed the possibility of appellant pleading not guilty by reason of mental disease several times, but appellant rejected that notion and, in any event, the attorney did not "feel that that defense would fly". Moreover, several psychologists' reports were very damaging to the case, bringing to light assaults on both his parents and grandmother, as well as assaults on other classmates and discipline problems throughout his life. Dr. Parwitaker's report specifically stated that appellant had no mental disease or defect. In fact, there was nothing in that new report by Dr. Parwitaker that had anything good to say about appellant. There was nothing in the report that the attorney thought helped with the case, as the report concluded that appellant knew and appreciated the nature

and quality and wrongfulness of the alleged offense and was capable of conforming his conduct to the requirements of the law.

Appellant cites a variety of cases, which he contends support his argument. Eddings v. Oklahoma, 455 U.S. 104, 114-15, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), is cited for the proposition that "The trier of fact must be permitted to consider any relevant mitigating factor, including a turbulent family history and emotional disturbance." The statute involved in that case was similar to our § 565.030.4, RSMo 1986, wherein evidence may be presented at the sentencing proceeding as to any mitigating or aggravating circumstances. In Eddings, the defendant produced evidence that he was 16 years old and that he had had an abused and turbulent family history and evidence of a psychiatrist and sociologist that the defendant was treatable. The trial judge mistakenly, as the United States Supreme Court found, believed he could not, as a matter of law, consider the evidence

of the defendant's background and considered only his youth as a mitigating circumstance. The trial judge found that the defendant's youth did not outweigh the aggravating circumstances proven by the state and sentenced the defendant to death. The Supreme Court remanded the case, instructing the state courts to consider what mitigating circumstances were presented, even though after consideration of that evidence and weighing the aggravating circumstances the court might come to the same decision. Eddings, 455 U.S. at 115. This case does not stand for the proposition that the defense must present "mitigating" evidence without regard to the potential adverse affect on planned trial strategy.

Appellant cites Holmes v. State, 429 So.2d 297 (Fla. 1983), which was a capital murder case where the death penalty was imposed. The court found defense counsel ineffective because he failed to produce the reports of two court-appointed psychiatrists who suggested the defendant may have been in some kind of disturbed

psychological state at the time of the murder. Though the court stated "A psychological disturbance at the time of a capital felony may be relevant in mitigation even though it is not sufficient ground for invoking the insanity defense", Holmes, 429 So.2d at 300, the instant case is obviously distinguishable. First, Ms. Crownover and Dr. Manion could not have testified as to appellant's disturbed state at the time of the murder, as their information was 6 to 11 years old. Second, in the present case, a psychological examination was made of appellant which concluded that he did not have a mental disease or defect. The record indicates that this examination was based in part on the documentation supplied by Ms. Crownover. In light of the fact that there was a conflicting report, only three months old, which revealed no mental defect and was contrary to the 5-year-old information appellant is complaining was not given to the jury, the cases are so dissimilar that Holmes is not persuasive.

Appellant also cites Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985) (overruled on other grounds in 784 F.2d 1479, 1494 (11th Cir. 1986)), cert. denied, 474 U.S. 1026, 106 S.Ct. 582 (1985), for the proposition that it is ineffective assistance of counsel to fail to investigate and present available mitigating character evidence. In Tyler the defendant was a woman sentenced to death for fatally poisoning her husband with parathion. No evidence was presented at sentencing. The court of appeals found defense counsel insufficient because he failed to produce mitigating evidence. The mitigating evidence omitted in Tyler was uncontroverted and unimpeachable:

> that Shirley Tyler had no prior criminal record, not even an arrest; that she had a good work record and used her earnings to help care for her family; that her husband was drunk and abusive at times and had knocked out some of her teeth when drunk; that she and her children moved away at one

> time because he drank and beat her; that on one occasion he put her out of the house in her night clothes; that she was a good mother, "crazy about her children," and kept them clean and cared for; that her character and reputation as wife and mother were good.

Tyler, 755 F.2d at 745. Blake v. Kemp, 758 F.2d 523, 534 (11th Cir. 1985), cert. denied, 484 U.S. 998 (1985), and King v. Strickland, 714 F.2d 1481 (11th Cir. 1983), vacated 467 U.S. 1211, 104 S.Ct. 2651, 81 L.Ed.2d 358 (1984) reaffirmed, 748 F.2d 1462 (11th Cir. 1984), are similarly distinguishable. Pickens v. Lockhart, 714 F.2d 1455 (8th Cir. 1983), and Clanton v. Blair, 638 F.Supp. 1090 (E.D. Va. 1986), cert. denied, 108 S.Ct. 762 (1988), were both cases where counsel was found to be ineffective in failing to follow up information of an abused and turbulent family history with a psychological evaluation or an investigation into mitigating circumstances. That is not the case here.

Appellant cautions us that, to rationalize the failure to present the mitigating evidence at issue on grounds that it would have little impact "can hardly warrant the label of 'strategy' particularly where, as here, counsel's experience gives no reason to suspect a deeper litigator's wisdom at work."[1]

> Despite this sage advice, Strickland requires us to "... indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"

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[1]Appellant's criminal trial attorney was admitted to the Missouri Bar on September 17, 1983, began working for the Public Defender's office in Poplar Bluff in October 1983, and tried appellant's capital murder case on June 14 and 15, 1984. He had tried one case previously, on May 11, 1984, which involved armed robbery.

Strickland v. Washington, 466 U.S. at 689. Moreover, the hearing court found the evidence was not adduced as a matter of trial strategy and we cannot disturb that finding unless the record reveals that it is clearly erroneous. Rule 27.26(j); Tyler v. State, 588 S.W.2d 3 (Mo.App. 1979).

The psychiatric evaluation of appellant concluded that he did know and appreciate the nature and wrongfulness of his conduct and was capable of conforming his conduct to the requirements of the law. § 552.020, RSMo 1986. The sum of evidence which could have been adduced from witnesses Crownover and Manion was: that appellant had been aggressive, hostile and went into uncontrollable rages and had shown improvement only while on medication in an institution; that appellant grew up in a non-nurturing environment and had a violent and angry relationship with his father; that all attempts at control, help and treatment of him had proven futile; that Dr. Manion expressed the

opinion that "treatment will facilitate adjustment, further adjustment"; and that the latest documentation by either witness was at least 6 years old.

The attorney was presented with a choice. Ms. Crownover and Dr. Manion could present two pieces of mitigating evidence: Movant's turbulent family history and his possible "further improvement" under treatment. If he put them on the stand, the rest of these witness' damaging testimony would also be available. In addition, Dr. Parwitaker's results of the psychiatric evaluation of appellant would be admissible to refute their testimony that movant was "disturbed" and "mentally ill". The language, that he did know and appreciate the nature and wrongfulness of his conduct and was capable of conforming his conduct to the requirements of the law, was potentially more damaging than the scant "mitigating" evidence available. Without evidence of the psychiatrist's (Dr. Parwitaker's) findings, it is not unreasonable

to conclude that the appellant had a better chance at a life sentence than if those findings were adduced, even if the fact that appellant had an unhappy and turbulent life as a child were available to the jury. The court in Porter v. State, 682 S.W.2d 16 (Mo.App. 1984), stated:

> "By the very nature of a criminal trial, a lawyer's function is a continuing judgmental process. Choices are constantly presented for one alternative action or another, often in a shifting factual situation with little or no time for reflective thought before decision is required. * * Factors which influence those practical judgments are often subtle and not apparent on a cold record. *** Likewise, in the setting of a criminal trial, the alternatives may be all bad."

Porter v. State, 682 S.W.2d at 19, quoting Brame v. State, 597 S.W.2d 665, 669 (Mo.App. 1980). The selection of witnesses to be called, like the introduction of evidence, is a question of

trial strategy "and the mere choice cf trial strategy is not a foundation for finding ineffective assistance of counsel." Franklin v. State, 655 S.W.2d 561, 565 (Mo.App. 1983). Even if later shown to be wrong, a decision made as to trial strategy does not support a finding of ineffective assistance of counsel. Porter v. State, 682 S.W.2d at 18.

> "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to secondguess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. (citation omitted)."

Strickland, 466 U.S. at 689. The decision not to present mitigating evidence at the penalty phase is "well within the range of practical choices not to be secondguessed, if the decision is

based on an informed and reasoned judgment." Laws v. Armontrout, 834 F.2d 1401, 1408 (8th Cir. 1987).

Moreover, the record does not indicate that the choice not to offer the mitigating evidence was sufficient to undermine the confidence in the outcome of the trial. There were seven eyewitnesses to the murder and a total of 26 witnesses corroborated testimony regarding the weapon, clothes and identification of appellant. All the details surrounding the killing were related to the jury and the jury found two aggravating circumstances of the killing. Appellant has made no showing that there is a reasonable probability that a life sentence would have been given if Crownover and Manion were put on the witness stand. As discussed previously, some mitigating evidence could have been produced, but the risk that the other damaging testimony of those witnesses in addition to Dr. Parwitaker's report could damage the case to a greater extent reasonably justifies the

nonproduction or that mitigating evidence. The record indicates it was just as likely that appellant would receive a death sentence without the mitigating evidence as it was with it. Point one is denied.

In his second point appellant asserts that counsel's inexperience denied him effective representation, and this inexperience was manifested in (1) conducting an ineffectual cross-examination of only a "handful" of state's witnesses, (2) failing to test eyewitness identifications, (3) failing to point out inadequacies in witnesses' descriptions of the cars involved, (4) failing to adequately develop the evidence militating against a finding of deliberation, (5) making only a perfunctory and futile closing argument, (6) failing to object to inadmissible testimony by Ronnie Felts' widow, and (7) failing to object to testimony of appellant's possession of numerous unrelated handguns. We assume, although it is only collaterally mentioned in appellant's reply brief, that

appellant is asserting that the alleged cumulative effect of multiple mistakes, such as that in Harris v. Housewright, 697 F.2d 202 (8th Cir. 1982), should compel a reversal based on the allegation of ineffective assistance of counsel. Appellant complains that the attorney cross-examined only eight of the state's twenty-six witnesses. At the hearing, the attorney explained his rationale was not to give the witnesses a chance to repeat their specific identifications and accounts of the events of the night. Appellant challenges the attorney's lack of ferocity in attacking the few inconsistencies in the witnesses' testimonies; to-wit: two of the six eyewitnesses to the murder remember appellant saying he would make "an example" out of them, in addition to consistently testifying to all other words spoken by the appellant; and the witnesses identified the cars driven by appellant in "vague" terms; and one witness only "thought" she could identify appellant.

The attorney explained at the motion hearing that he did not want to give any witness a chance to repeat damaging testimony. In any event, "the extent of cross-examination and the subjects covered must in virtually every case be left to the judgment of counsel." Atkins v. State, 741 S.W.2d 729, 731 (Mo.App. 1987), quoting Williams v. State, 712 S.W.2d 404, 409 (Mo.App. 1986)[.]

Additionally, although every eyewitness testifying identified appellant unequivocally, except for one witness, appellant contends that he was deprived of effective assistance of counsel in the attorney's failure to impeach that one witness on her "equivocal" identification. The trial transcript reads:

Q. Can you identify the man that had the gun that evening?

A. I think so. Yes. Yes.

Q. Did you see him well enough that you can point him out to the jury?

A. Yes.

Q. Do you see him in the courtroom today?

A. Yes.

Q. Would you point out that man for the jury please?

A. It's the man sitting over there.

Q. Are you indicating the man with the blue shirt seated to the left of [appellant's attorney]?

A. Yes.

The record does show that, even in the face of overwhelming and accurate identifications, the attorney did attempt to undermine the identification testimony by questioning the lighting in the bar that night.

Appellant alleges the following were "vague" descriptions of the cars he drove during his escapade: "a Ford station wagon ... [b]rown and white ... an older car", "Brown station wagon ... in its seventies"; "brown Ford station wagon ... '67 model"; "1973 Ford Ranch Wagon ... bronze or brown or similar to that"; and with respect to the car appellant took from a patron

of the Blue Moon, "'73 Ford Torino"; "gold Torino, Ford". These car descriptions are not vague nor are they necessarily inconsistent, particularly considering the independent basis of each witness' testimony.

There is no merit to these accusations. The question of impeaching a witness is a matter of trial technique and strategy and cannot be the basis of a breach of duty toward appellant. Jackson v. State, 540 S.W.2d 616, 617 (Mo.App. 1976). Moreover, we find these "inconsistencies" minor at best and agree with the hearing court that appellant has not shown how he was prejudiced by not impeaching these witnesses. See Hurd v. State, 637 S.W.2d 809, 811 (Mo.App. 1982).

Appellant next complains that the attorney failed to adequately develop evidence militating against a finding of deliberation. Evidence of deliberation was overwhelming. Appellant had possessed the gun two days prior to the crime spree; had purchased shells the day before, and

utilized 15 rounds of ammunition in target practice with the gun; and had shot another person in the back prior to entering the bar where he shot and killed Ronnie Felts. Even appellant admits that the attorney did make an attempt to show an absence of deliberation. On cross-examination of Richard Shirker, he elicited testimony that appellant "swung the pistol around", did not say anything, and fired the shot at Ronnie Felts. Then, during his closing statement, he developed this "scrap" of evidence in an attempt to convince the jury that what appellant did was not the deliberate and cool reflection required for a capital murder charge. Considering the facts in the record, it is difficult to see how the attorney's performance fell below that of a reasonably competent attorney and even if it did, in light of the overwhelming evidence otherwise, no conceivable prejudice resulted from the attorney's handling of the deliberation issue and appellant has shown none.

Appellant faults the attorney's closing argument as being "perfunctory and futile". Appellant does not develop this accusation in his brier or his reply brief; in fact no mention is made whatsoever as to why the attorney's closing argument was perfunctory or futile. It is not a requirement of a good closing argument that it be long, and length of the argument is no measure of its effectiveness. 2Mo. Civil Trial Practice, § 14.38 (Mo.Bar 2d ed. 1988). A bare allegation of "futility" of closing argument without reason or argument to support that accusation, will not be addressed on appeal. Rule 84.04(d).

Appellant also complains that the attorney failed to object to identification by the decedent's widow. Mrs. Felts identified as her husband the man pictured in previously-admitted Exhibit #3. Earlier, Exhibit #3 had been identified by a criminal investigator who photographed the victim at the Blue Moon. Mrs. Felts also mentioned she had two children. No mention

of this was made on direct appeal or in either of the two Rule 27.26 motions tendered by appellant. We understand that appellant does not assert this "error" independently, but only as part of the alleged mass of cumulative attorney error which he claims contributed to the ineffective representation. However, the only evidence that may have been inadmissible was that concerning the fact that the deceased had two children. State v. Baublits, 324 Mo. 1199, 27 S.W.2d 16, 19 (1930). In light of the overwhelming evidence against appellant, it is difficult to see any prejudice to appellant, considered alone or in conjunction with the rest of the alleged "inefficiencies" of the attorney's conduct of appellant's defense.

Appellant complains that evidence that he came to Lawrence Peal's house on January 1, 1984, with 17 handguns reached the jury. The objection was sustained as being unrelated to the crime and the state was directed to identify only the one weapon that was used. It is

true that the attorney might have asked the court to strike the number of handguns from the record, but it is difficult to see how this omission prejudiced the defendant in any substantial way. The jury had already heard that appellant brought 17 handguns to the house. A motion to strike might just have drawn their attention to the number. Admittedly, the attorney's objection should have been made before the witness answered, but as a practical matter the answer may have come more quickly than expected or might have been unexpected. The record reflects the order in which the reporter took down the testimony and objections, it does not give us insight into whether or not the attorney attempted to object before the actual answer was given. The attorney stated the objection and grounds therefore in open court; the jury knew the impropriety of the introduction of that testimony.

Appellant bases his "cumulative effect of mistakes" argument on a case which reversed and

remanded a life sentence on the grounds of ineffective assistance of counsel. Harris v. Housewright, supra. There, the two attorneys representing the defendant committed the following, which the court adjudged cumulatively amounted to ineffective assistance of counsel: (1) the two young attorneys were appointed by the court, but requested and received $500 from the defendant's family -- no such improper conduct is alleged in the present case; (2) although the heinous crime was well reported in the local papers, the attorneys, when requesting a change of venue, produced no witnesses to support their contention that the defendant could not receive a fair trial while the state produced seven witnesses; in the present case appellant specifically chose to waive venue because he wanted to stay in the county - a fundamental decision well within his own authority to make, State v. Johnson, 714 S.W.2d 752, 766 (Mo.App. 1986); (3) during voir

dire of the jury, the attorneys in Harris revealed jurors with strong biases in favor of the prosecution, yet did not exercise their peremptory challenges and did not challenge these jurors -- in the present case, it is complained that the attorney failed to "reverse Witherspoon" the jury; however no allegation is made and none supported by the record that the attorney did not otherwise "prune" the prospective jurors down to an unbiased group; (4) the attorneys were not even aware of the witnesses the prosecution was calling or what their testimonies were to be, even though all the information was provided to them before trial -- no such allegation can be made in the present case; (5) a major piece of evidence linking the defendant in Harris to the murder was introduced by testimony which was blatant hearsay, and the prosecutor even alerted the court to that fact, but the attorneys did not object to that fatal testimony -- no such blatant or fatal errors can be found in the present record and the errors

alleged by appellant on this appeal do not approach the proportion that this one in the Harris case does; (6) one gun allegedly stolen in the robbery was seized pursuant to a search warrant based on a false statement which, when omitted, casts serious doubt on the sufficiency of probable cause for the search of the weapon, yet the attorneys never questioned the validity of the affidavit other than through a general objection -- no such claim is made here; (7) the prosecution presented an expert witness who gave testimony which was arguably contrary to the prosecution's theory of the case, but neither attorney impeached that testimony even though they had the report prior to trial --
no such contradictory expert testimony existed in the present case; (8) the defendant's attorney in Harris opened up, on cross-examination, questioning on a very gruesome and prejudicial aspect of the case which allowed the prosecution to continue with the lead on redirect, over subsequent objection -- no such grave error

occurred in the present case and, in fact, the evidence at the hearing clearly showed an affirmative attempt by the attorney to evade that effect; (9) the attorneys did not object to the defendant appearing before the jury in shackles -- here appellant was not compelled to appear in shackles in the present capital murder trial; (10) neither attorney for the defendant in Harris objected when the prosecutor commented on defendant's failure to testify or his own personal belief that defendant was guilty --no such egregious errors went unobjected to in the present case; (11) the attorneys failed to raise a known defense of potential merit -- no accusation can be made in the present case.

Certainly the fact situation in Harris is clearly distinguishable from the present case, although appellant attempts to stretch the record to make the situations appear comparable. Even if cumulative errors, each insufficient in itself to be a constitutional ground for ineffective assistance of counsel, could be grounds

for a new trial when their effect is viewed as a whole, Missouri has upheld situations probably more adverse to a defendant than the present. See Parcel v. State, 687 S.W.2d 621 (Mo.App. 1985); Neal v. State, 703 S.W.2d 570 (Mo.App. 1986).

To establish ineffective assistance of counsel, appellant must show there is a reasonable probability that but for the attorney's unprofessional errors, the result of the proceeding would have been different. Howard v. State, 698 S.W.2d 23, 25 (Mo.App. 1985). The only thing the attorney might have done was to point out the short length of time the eyewitnesses had to see appellant in the bar. Even if that were done, the evidence was overwhelming that, despite the shortness of time, each eyewitness was sufficiently sure and definite of his identification that what little impeachment that might have been done could have made little or no difference in the outcome. The majority of these "cumulative errors" made at trial were

either reasonable in light of the circumstances or not prejudicial. When considered as a whole, their effect, even cumulative, is not such that it undermines our confidence in the outcome of the proceedings. The hearing court was not clearly erroneous in finding that no prejudice was shown to have resulted from failure to cross-examine, failure to object to the complained of evidence, or failure to develop an opening argument. The majority of these complaints have no support in the record, and even when viewed as to cumulative impact did not result in such prejudice as to justify a retrial. Therefore, the second point must be ruled against appellant.

Appellant's third point on appeal of his Rule 27.26 motion concerns his criminal trial attorney's failure to "reverse Witherspoon" the jury to ascertain whether they could consider a life sentence as opposed to the death penalty. Appellant also makes a one sentence assertion that the attorney did not ask about "the

presumption of innocence and burden of proof", but appellant makes no argument on the claim and no clarification as to why that was error. With respect to these latter claims, since they were not presented to the hearing court in any of the Rule 27.26 motions nor raised at the hearing and since appellant has made no effort to argue the claims, we do not consider these alleged errors and will restrict our review to the "Witherspoon" issue.

The United States Supreme Court, in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776, cert. denied, 393 U.S.898, 89 S.Ct. 67 (1968), held that a juror may not be expelled for cause if he merely has general objections to the death penalty or expresses conscientious scruples against its infliction. Witherspoon, 391 U.S. at 522. The court's main concern was to prevent organization of a jury "uncommonly willing condemn a man to die." Witherspoon, 391 U.S. at 521. The question to be answered on this appeal is whether failing to

question veniremen as to whether they would automatically sentence a defendant to death (i.e., the reverse of the question required in Witherspoon) is necessary to a fair trial.

The hearing court found that all prospective jurors who were questioned stated they would base their decision as to whether or not to give the death penalty upon the facts and the law. This finding is supported by the record. Although a venireman who would automatically vote to impose a sentence of death upon a finding of guilt regardless of the circumstances may be challenged for cause, if the record reflects his assent to follow the court's instructions and a willingness to consider both penalties authorized for capital murder then no resultant error occurs in the non-removal of that venireman from the panel. State v. Smith, 649 S.W.2d 417, 425 (Mo. banc 1983), cert. denied, 464 U.S. 908, 104 S.Ct. 262, 78 L.Ed.2d 246 (1983).

In State v. Mathenia, 702 S.W.2d 840 (Mo. banc 1986), cert. denied, 477 U.S. 909, 106 S.Ct. 3286 (1986), a venireman unequivocally stated twice that he would automatically vote for the death penalty. The court, on appeal of the trial court's refusal to strike that venireman for cause, held that since he did not respond negatively to the question whether he would be able to follow the court's instructions, the trial court did not err in refusing to strike that venireman. State v. Mathenia, 702 S.W.2d at 843-844. In the present case, all the prospective jurors were asked if there was "[a]ny reason at all why you would not be able to follow the other instructions of the Court in this case?" No juror responded negatively, as was the case in State v. Mathenia, supra. Unlike that case, however, there was no indication of any death-prone veniremen, and the court's holding in Mathenia makes it clear that a venireman's willingness and ability to follow

the court's instructions renders him competent to serve on the jury.

The trial court asked each juror whether he would be able to follow the instructions of the case and failure to ask whether the veniremen would automatically favor the death penalty was not fatal to the acquisition of a fair jury. The trial attorney in failing to ask the "reverse Witherspoon" question did not fall below the standard of reasonable competence. A reasonably competent attorney might feel that as long as a venireman indicates he is able to follow the court's instructions, he would not be successfully challenged for cause and the attorney may reasonably conclude that the asking of the "reverse Witherspoon" question is not necessary to ensure a fair jury, in light of Mathenia.

The fact that the jury's assent to follow the court's instructions and the law came in the form of MAI-CR 2d 1.02 does not lessen the jury's resolve to act in conformity with that

assent. Appellant asserts that, because counsel in State v. Brown, 547 S.W.2d 797 (Mo. banc 1977), had a right to inquire directly on voir dire about the burden of proof for self-defense, apart from the general instruction in MAI-CR 1.02 as to the burden of proof, failure to do so here requires reversal. The court in Brown, 547 S.W.2d at 799 held defense counsel had a right to so inquire because the burden of proof issue, unlike most affirmative defenses, is on the state in a self-defense case. The court did not say such an inquiry was required, over and above that made in MAI-CR 1.02.

In any event, no showing of prejudice has been made. The hearing court found that failure to ask the "reverse Witherspoon" question did not indicate any commitment of the jury to give the death penalty regardless of the circumstances. The record on voir dire, as well as testimony by jurors at appellant's Rule 27.26 hearing, indicate a willingness by all veniremen not otherwise stricken for cause to proceed to

decide the case upon the court's instructions and with reference to the facts and law. That finding is supported by the record and cannot be deemed clearly erroneous. The point must be ruled against appellant.

Appellant next faults the attorney with another barrage of trial errors: (1) that he failed to submit or argue as a mitigating circumstance the fact that appellant's only prior conviction was a Class C felony for stealing; (2) that he failed to object to argument by the prosecutor; and (3) that the attorney made reference to the fact that appellant had not testified. It is appellant's contention that these errors, "taken together or in combination with the other errors noted in this brief" resulted in the ineffective assistance of counsel, requiring reversal of the death sentence.

One of the mitigating circumstances recognized in § 565.032.3(1), RSMo 1986, is that "[t]he defendant has no significant history of prior criminal activity". The trial transcript

indicates that appellant was convicted of the Class C felony of stealing and sentenced to a term of four years in the Missouri Department of Corrections. The attorney had submitted that fact as mitigating evidence but withdrew it prior to the penalty phase. The prosecution then submitted that evidence for the jury's consideration. The attorney's confusion as to its submission is apparent from the transcript and belies the explanation he offered at the hearing that he did not offer it as a mitigating circumstance to keep the prosecution from "harping" on that conviction. The prosecutor made it known to the attorney that if he did not offer it as a mitigating circumstance, the prosecutor would offer it into evidence himself.

Even if the attorney should have submitted that mitigating circumstance, it is difficult to see how appellant was prejudiced. First, if appellant's concern is for the jury to know he only had one prior offense, that fact was brought out at trial. The fact that it was only

a Class C felony of stealing was explicitly mentioned. Second, the instruction to the jury made them aware "You may also [in addition to the mitigating circumstance of age already submitted] consider any circumstances which you find from the evidence in extenuation or mitigation of punishment." The jury knew it could consider the lone prior offense in mitigation of appellant's punishment. No prejudice has been shown by appellant to have resulted from this omission if it was such.

Appellant also claims that he was prejudiced by the prosecution's summation, which referred to a report not in evidence inferring the death penalty was an effective deterrent of crime. Appellant is critical that the attorney made no "effort to forestall or cure the error". The remarks were made in the following context:

> What I want you to consider is what happened in this country and what has happened in this country over the last ten or fifteen years that we have not had--not

instated the death penalty. What has happened to us?

You all have lived in our society during the last fifteen years. What's happened from the early sixties, the late fifties, to 1984? What happened in the years that we got soft on crime?

And I think you're going to have to agree with me, if you reflect at all, that our society has become a society where the cutthroats and the murders [sic] can do what they want.

And we read it so often in the paper that it doesn't even bother us any more. We see blood and gore every day on TV and our children see it and they think that that's what life's all about now.

Every man for himself. The man with the biggest gun wins. The man that shoots first wins and the losers are those people who are hurt and maimed and left lying dead on the floor.

Now you might ask, "Is that the state of conditions as a result of us not having the death penalty?" And you might say, "We've had the death penalty all along." But have we?

No. We have had individuals sentenced to death but there was not a conviction in this country since the late sixties until 1983. And what happened in 1983? What report came out about three days ago and showed us that violent crime dropped more than ten percent in 1983?

When this society decides to get tough on crime and when this society decides that punishment must be sure, then we will not have to live in fear in our society any more.

It is generally true that counsel should refrain from arguing matters not in evidence. State v. Bailey, 526 S.W.2d 40, 43 (Mo.App. 1975). However, prosecutorial comment referring to facts not before the jury may be permissible,

so long as it does not imply special knowledge of evidence pointing to defendant's guilt. State v. Newlon, 627 S.W.2d 606, 617 (Mo. banc 1982), cert. denied, 459 U.S. 884, 103 S.Ct. 185, 74 L.Ed.2d 149, rehearing denied, 459 U.S. 1024, 103 S.Ct. 391 (1982). Moreover, the prosecutor may comment on the prevalence of crime, the necessity of law enforcement to deter crime, and the evil results which might befall society if a jury fails to perform its duty. State v. Hubbard, 659 S.W.2d 551, 558 (Mo.App. 1983). The prosecutor's final argument may exploit legitimate inferences which the evidence yields and the law allows the prosecutor wide latitude for comment. State v. Hodges, 586 S.W.2d 420, 427 (Mo.App. 1979).

With these principles in mind, we examine the competence of appellant's attorney in failing to object to that argument. Taken as a whole, the tenor of the prosecutor's argument concerned the effect of the death penalty on the deterrence of crime and the need to "get tough

on crime". The incidental reference to "the report" was fleeting and was not dwelled on. The whole argument, despite the reference to the report, could rationally be taken as merely prosecutorial comment on the need for deterrence and the part the death penalty could play in reducing crime. Such argument is generally proper and counsel is not incompetent to fail to object thereto, although in retrospect it is easier for us to calmly examine the record and conclude an objection might have been made to the reference to the report not in evidence. See Parcel v. State, 687 S.W.2d 621 (Mo.App. 1985). Objections "might" be made at any point during the trial, but for matters of trial strategy competent counsel might weigh the harms and conclude that objection is not worth the risk of alienating the jury or highlighting the offensive comment. To this extent, we will not second guess trial counsel.

In any event, even if the attorney's failure to object to the offensive prosecutorial

comment did fall below that expected of competent counsel, it is difficult to discern any resultant prejudice to appellant. Appellant certainly has not aided us in pointing out how he was prejudiced in light of the substantial basis upon which the jury had for otherwise determining the punishment required.

The last in appellant's trilogy of compound errors is the complaint that the attorney referred to the fact that appellant did not have to testify. The attorney stated:

> "The defendant didn't have to testify in this case. Under Missouri law, no defendant does and the prosecutor can't say anything about that."

This remark is a far cry from arguing inferences from the fact that the defendant did not testify, which is the argument that is protected by the general rule which proscribes comment on such circumstances. The jury already knew that the defendant did not testify and it is difficult to reconcile that statement with

any resultant prejudice. Prejudice might be easier to find if the remark were made during the guilt phase of the trial, but appellant's guilt had already been determined and the most that can be made of the remark at the penalty phase is that appellant should not be condemned to die merely because he did not testify.

The cases cited by appellant do not support the argument that the attorney's conduct fell below the commonly accepted standard or that prejudice resulted. In Mullins v. Evans, 473 F.Supp. 1321, 1323 (D. Colo. 1979), the defense attorney literally did nothing, in addition to mentioning the fact that he had informed the defendant he could testify but that defendant chose not to. The court in Mullins found the defense attorney's conduct objectionable not on the basis of that lone remark, but because of his entire trial strategy, which was to let the jury convict the defendant of 1st degree murder, when the circumstances of the case clearly called for an argument for leniency. Mullins,

473 F.Supp. at 1323-1324. In two of the three Missouri cases the prosecutor commented upon the defendant's failure to testify and the inferences therefrom in the guilt phase of the trial. State v. Chunn, 657 S.W.2d 292, 295 (Mo.App. 1983); State v. Dupepe, 241 S.W.2d 4, 7 (Mo. 1951). In State v. Gray, 503 S.W.2d 457, 461-462 (Mo.App. 1973) the court commented upon the defendant's failure to testify. These prejudicial circumstances are not present in the present case.

Even viewed collectively, these alleged "cumulative" errors do not undermine our confidence in the verdict rendered, as required by Strickland v. Washington, 466 U.S. at 694. This was not a "close case"; the jury took a half an hour to reach a decision as to appellant's guilt and slightly over an hour to determine his penalty. The offensive remark and omissions brought to light by appellant, while not exemplary conduct of an attorney, were fleeting and relatively harmless considering the great weight

of evidence which supports the jury verdict. Moreover, the guilt of appellant had already been decided and the remarks complained of and the failure to submit the mitigating circumstance of no serious prior offenses, as previously discussed, had little influence upon the penalty decided.

Appellant's next set of cumulative errors relate to his trial on robbery, kidnapping, assault and stealing charges. He claims that the hearing court did not make specific findings of fact and conclusions of law as required by Rule 27.26(i). Additionally, he claims the attorney incompetently represented appellant because (1) he conducted a brief and inadequate voir dire (2) asked only one question of one of 17 state witnesses (3) failed to object to inadmissible evidence and (4) waived closing argument. None of these claims were raised at appellant's Rule 27.26 hearing or in appellant's pro se motion. These issues were never presented to the hearing court and its failure to make

specific findings thereon cannot be error. See Rule 27.26(i).

As to the specific allegations of error, we have reviewed the record and found something missing: any meritorious argument for leniency. Just what the attorney should have done is not disclosed by appellant and we are left to examine over the record and discern what in the transcript supports his complaint. We find nothing. Appellant makes a general statement that the attorney did not object to some hearsay statements, but in our perusal of the record, we can find only one piece of hearsay evidence which did not fall within an exception and the attorney did make an objection which was promptly sustained by the trial court. The attorney did not "merely sit beside" appellant at trial. Numerous objections were made, some sustained, some overruled. In any event, trial counsel's failure to object to admission of evidence warrants post-conviction relief only if that failure deprives defendant of a fair trial.

Patterson v. State, 625 S.W.2d 178 (Mo.App. 1981). No such deprivation exists here.

As for cross-examination of the state's witnesses, the attorney's strategy in not questioning them was not a "tacit concession" of appellant's guilt; direct examination of those witnesses confirmed that. All the state's witnesses made a positive identification of appellant and each testified unambiguously to facts within his personal knowledge, except for one who testified to the hearsay statement objected to. The testimony was practically unimpeachable and the attorney made a thought-out tactical decision not to cross-examine these witnesses upon facts which were clearly ascertained and corroborated. That decision will not be second-guessed on appeal.

Appellant also would condemn the attorney's voir dire because it was "barely two pages long". The prosecution had already covered the issue of "reasonable doubt" and the judge had already inquired of the jury "If you are not so

convinced [that defendant is guilty], you must give him the benefit of the doubt and find him not guilty." The attorney devoted the voir dire to previous knowledge of the case, relationships to the lawyers involved, the witnesses involved and the victims involved. Though this voir dire might have been more thoroughly developed, it is not so insufficient that it denied appellant a fair trial. Counsel's conduct fell within the range of acceptable practice.

Appellant's complaint that the attorney made no closing argument is meritless. He was not required to make any argument, opening or closing, and his decision in that regard is considered part of trial strategy. Harroald v. State, 438 S.W.2d 202, 204 (Mo. 1969). An attorney's trial strategy will ordinarily not be questioned on review, particularly in light of the fact that the court in Strickland concluded that strategic choices are "virtually unchallengeable". Strickland, 466 U.S. at 690. We can find no exceptional circumstance to place

this case outside the general rule. Nothing in the record indicates that the attorney's sense of hopelessness "distorted his professional judgment." Strickland, 466 U.S. at 699.

The attorney cannot be said to have deprived appellant of the right of an adversarial testing of the state's evidence. The evidence was overwhelming. Appellant did not want to call any witnesses and appellant did not want to testify. Appellant had discussed his decisions fully with the attorney and at trial appellant had no complaints with the attorney's representation or his decisions. These claimed "errors" alone or in combination do not rise to constitutional proportions required for post-conviction relief under Rule 27.26 and the point must be denied.

Appellant next challenges the attorney's failure to move to sever the occurrences charged at the Kater Inn, the Blue Moon Tavern and the Coachlight Motel. Appellant first claims that, because the trial judge made no specific

findings of fact or conclusions of law, reversal for specific findings is necessary and required by Rule 27.26(i). The judge concluded his findings with, "While other complaints of ineffective counsel were raised, no evidence was produced indicating the defendant was prejudiced by the conduct of counsel." It can reasonably be concluded that the instant issue was considered by the judge and he specifically found that appellant failed his burden of proof to show prejudice; thus, we will review the record to determine whether the finding as to lack of prejudice was clearly erroneous. Abrams v. State, 698 S.W.2d 15, 17-18 (Mo.App. 1985); Rule 27.26(j).

Appellant alerts us that in 1984, Rule 23.05 permitted the state to join offenses "which are based on the same act or on two or more acts which are part of the same transaction or on two or more acts or transactions which constitute parts of a common scheme or plan...." Rule 23.05(a) (since revised). Appellant

suggests the charges for which he was tried on November 14, 1984, fell into three groups: (1) the robbery of Kater Inn, the abduction of Sandra Buttry and the assault on her; (2) the robbery, assaults, kidnapping and car theft at the Blue Moon Tavern; and (3) the robbery of Ollie Gaultney at the Coachlight Motel. Appellant claims Rule 23.05 did not contemplate the joinder of these transactions since they are within neither the "same transaction" nor "common scheme or plan" rubrics.

Indicative of what our courts accept as charges based on a series of acts which are "part of the same transaction" is the scenario represented in State v. Robinson, 591 S.W.2d 18 (Mo.App. 1979), where the defendant, after killing his victim, stole his car and fled; while in flight, he shot an officer trying to apprehend him. The court upheld the denial of severance. Robinson, 591 S.W.2d at 20. The court in State v. Callies, 588 S.W.2d 18 (Mo.App. 1979), upheld the denial of severance where the defendant,

tried on escape and robbery charges, had escaped from prison and thereafter demanded at gunpoint a car from another man in the area. Callies, 588 S.W.2d at 20.

In order to charge an accused with offenses in separate counts in one indictment under the "common scheme or plan", those offenses must be the product of a single or continuing motive. State v. Harris, 669 S.W.2d 579, 581 (Mo.App. 1984). In State v. Allbritton, 660 S.W.2d 322 (Mo.App. 1983), the court found ample evidence of a common plan or scheme by the defendant to assault women. In Allbritton, the defendant, on the pretext of a fabricated story, forced his way into a woman's apartment and placed his knife against her throat, but fled when the apartment manager arrived. Shortly thereafter, he entered another woman's house, fabricated a story, and, using a knife, threatened, cut, robbed, raped and sodomized her and her daughter. The same knife was used on all victims, the Kool brand of cigarettes were identified by

all the victims, the crimes occurred within the same vicinity and within a short time of one another. Allbritton, 660 S.W.2d at 327.

Similarly, the defendant in State v. Couvion, 655 S.W.2d 80 (Mo.App. 1983) was spotted at the entrance of a Children's Zoo early on the morning that a zoo ranger found pry and scratch marks on the door entrance as well as a crack in the plexiglass ticket window. The defendant's fingerprints were found on the glass. The following morning the rangers found the ticket window at the zoo's entrance had been broken out, the door pried and the lock bent. A black leopard cub was found missing from her cage. On both mornings, a police officer noticed the defendant's car parked near the zoo. The court upheld the denial of a motion to sever because there was evidence of a common scheme or plan, "that is to say the offenses were products of a single or continuing motive. State v. McCrary, 621 S.W.2d 266, 271 (Mo. banc 1981)." Couvion, 655 S.W.2d at 82.

The present record provides ample evidence of a common scheme or plan. In all instances appellant announced, "This is a holdup", or similar words to that effect; he threatened each victim at each location with the same type of gun, identified by each eyewitness; he attempted to take a female hostage in each instance; in each case he demanded money from the cash register; on two of the instances he indicated to his female hostages that he wished them to perform sexual acts; in two instances he instructed his victims to lie face down on the floor; and in all instances he had procured a stolen car for his getaway. There is ample evidence in the case to support the determination that the crimes prosecuted on November 1984 were all part of a common scheme or plan, as our courts have defined it in case law. Thus, a decision by the attorney not to make a motion to sever would not be unreasonable in light of the then-existing law which clearly indicates joinder of the

charges was proper and a denial of the motion would be likely.

Moreover, it is difficult to imagine, even presuming the unlikely event that a motion to sever would be granted, how the result would have been any different. The state produced substantial, ample evidence to support each count of robbery, assault, stealing and kidnapping charge alleged, individually and without reference to the other evidence. Each eyewitness positively and without a doubt identified appellant as the perpetrator of the crimes. Each witness testified unambiguously to the facts and circumstances surrounding each charge. We realize it is generally true that evidence of other crimes is prejudicial if not necessary to prove the crimes charged and would be considered by the court in determining whether to sever the charges. However where, as here, the evidence is so overwhelming as to guilt for each charge, we cannot believe the result would have been any different.

Appellant must overcome a strong presumption of the attorney's competency at trial. Jackson v. State, 672 S.W.2d 367, 368 (Mo.App. 1984). Appellant failed to overcome that presumption. In the present case, the incidents are intertwined with one another and easily appear to be "part of a common scheme or plan." Particularly in light of the fact that most of the evidence had previously been adduced at appellant's capital trial, the attorney knew in advance the substantial and overwhelming evidence to be produced on each count and could reasonably have concluded that a motion for severance would have been a futile and time-consuming effort. Furthermore, we are not convinced that appellant would have had a better chance for acquittal on any of the charges in separate proceedings even if severance had been ordered, and appellant has not demonstrated how he was prejudiced to the extent necessary for a constitutional violation of his right to effective counsel. This point is denied.

In his final claim of error, appellant attacks his criminal trial attorney's sufficiency of representation on the ground that he failed to request MAI-CR2d 3.60, instructing the jury to limit their consideration of substantial evidence of other crimes. Appellant also complains that the attorney did not remind the court to admonish the jury at recesses with MAI-CR2d 1.08. MAI-CR2d 3.60 reads as follows:

> If you find and believe from the evidence that the defendant was (involved in) (convicted of) (an offense) (offenses) other than the one for which he is now on trial (and other than the offense mentioned in Instruction No. ____), you may consider that evidence on the issue of (identification) (motive) (intent) (absence of mistake or accident) (presence of a common scheme or plan) ([<u>specify other purpose for which the evidence was received as substantive evidence of guilt</u>]) of the defendant (and you may also consider such evidence for the

purpose of deciding the believability of the defendant and the weight to be given to his testimony). (You may not consider such evidence for any other purpose.)

At the hearing on appellant's Rule 27.26 motions, the attorney explained his reasoning behind not requesting that instruction: "I knew that all it would serve to do would be to reiterate to the jury the evidence of the other crimes and I thought the less they thought about that the better." The attorney believed that instruction would allow the prosecutor to highlight the various ways the jury could use that evidence. The court in Williams v. State, 712 S.W.2d 404, 407 (Mo.App. 1986), quoting Love v. State, 670 S.W.2d 499, 502 (Mo. banc 1984) stated: "'[a]n objectively reasonable choice not to submit an available instruction does not constitute ineffective assistance of counsel."'

The attorney made a reasonable choice and will not be found to be ineffective on this ground. Moreover, we agree with the motion

judge's conclusion that appellant has not demonstrated how this omission has prejudiced him. Since neither prong of the Strickland test is met, the attorney's representation will not be found to be ineffective on this ground.

Appellant does not show how he was prejudiced by the omission of MAI-CR2d 1.08, if it occurred, other than to point out that knowledge of his offenses was widespread in the community. Even then he fails to explain how the giving of MAI-CR2d 1.08 would rectify the existent knowledge to the extent that a different result may have been obtained. Hence, even if we assume, arguendo, that the attorney's failure to remind the court to give the instruction at the two recesses fell below the conduct expected of a reasonably competent attorney, appellant's complaint must fail because he had not met his burden of proving prejudice so substantial as to undermine confidence in the outcome of the trial. This point is denied.

The judgment is affirmed.

All concur.

AMENDED ORDER
UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-2915EM
No. 90-1015EM

Kenneth L. Kenley, *
*
Appellant, *
*
vs. *
*
Bill Armontrout, *
*
Appellee. *
* Appeal from the
* United States
* * * * * * * * * District Court for
* the
* Eastern District
* of Missouri.
Kenneth L. Kenley, *
*
Appellant, *
*
vs. *
*
Bill Armontrout, *
*
Appellee. *

Appellee's petition for rehearing with suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Rehearing by the panel is also denied.

August 13, 1991

Order Entered at the Direction of the Court:

(s) Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
_____ DIVISION

PETITION

1. Name the location of court which entered the judgment of conviction under attack: Poplar Bluff County[,] Butlar [Butler County, Poplar Bluff, Missouri]

2. Date of judgment of conviction: July 13[,] 1984

3. Length of sentence: Death

4. Nature of offense involved (all counts): Capital Muder [sic]

5. What was your plea? (Check one)

   (a) Not guilty [X]
   (b) Guilty [_]
   (c) Nolo Contendere [_]

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____

6. Kind of trial: (Check one)

   (a) Jury [X]
   (b) Judge only [_]

7. Did you testify at the trial?

   Yes [_] No. [XX]

8. Did you appeal from the judgment of conviction?

   Yes [X] No. [_]

9. If you did appeal, answer the following:

   (a) Name of court: Missouri Supream [sic] Court
   (b) Result: Denied
   (c) Date of result: Unknown
   (d) Grounds raised: Court erred in overruling motion in limine to prevent introduction of any crimes other than capital muder [sic] and in allowing and introduction of evidence of such crimes because those crimes were prejudicial. 2Death [sic] sentence was excessive and disproportionate and Death qualifyed [sic] jury.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to the judgment in any court, state or federal? Yes [X] No. [_]

11. If your answer to 10 was "yes," give the following information:

   (a) (1) Name of court: Butlar [sic] County
   (2) Nature of proceeding: 27-26 [sic]
   (3) Grounds raised: Ineffective Assistance of counsel
   (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes [X] No. [_]
   (5) Result: Denied
   (6) Date of result: November 18[,] 1986

(b) As to any second petition, application or motion[,] give the same information:

(1) Name of court: Missouri court of appeals[,] southern district
(2) Nature of proceeding: Appeal 27-26 [sic]
(3) Grounds raised: Ineffective Assistance of counsel
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes [X] No. [_]
(5) Result: Denied
(6) Date of result: September 7[,] 1988

(c) As to any third petition, application or motion, give the same information:

(1) Name of court: Missouri court of appeals[,] Southern District
(2) Nature of proceeding: Motion for rehearing and application for transfer jurisdiction
(3) Grounds raised: Ineffective Assistance of counsel
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes [_] No. [X]
(5) Result: Denied
(6) Date of result: September 27[,] 1988

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc.
Yes [X] No. [_]

(2) Second petition, etc.
Yes [X] No. [_]
(3) Third petition, etc.
Yes [X] No. [_]

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to his conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition

will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: See attached sheet

Supporting FACTS (tell your story *briefly* without citing cases or law):

Point One

Counsel failed in his sixth and eighth amendent [sic] duty to investigate and present such evidence. In that counsel had access to

lay and psychiatric evidence concerning appellants [sic] genetic background,turbulent [sic] and abused family history and psychiatric record including evidence that his condition could be improved. Appellant was prejudiced in that the killing was sudden. The only two aggravating circumstances concerning the crime itself. And evidence of his history could reasonably [have] resulted in a life sentence.

B. Ground two: See attached sheet

Supporting FACTS (tell your story *briefly* without citing cases or law):

Point Two

Counsel failed in his sixth amendment duty during voir dire in that appellant [sic] trial because record shows that counsel failed in his duty to secure appellant a jury able to consider a life sentence. And to consider the guilt phase issues. In that he failed to inquire of the jurors if they could consider a life sentence. Made no attempt to rehabilate [sic] jurors who had been disqualified as opponts [sic] of the death penalty.And [sic] failed to inquire about such issues as the jurors[']] ability to follow the presumption of innocence and burden of proof.

C. Ground three: See attached sheet

Supporting FACTS (tell your story *briefly* without citing cases or law): To be proven upon completion of discovery.

Point Three

Counsel failed in his sixth amendment duty at the punishment phase of his trial in that counsel failed to submite [sic] or arque [sic] the statutory mitigating circumstances of no

significant criminal history though appellant had only one prior conviction for stealing.

D. Ground four: See attached sheet

Supporting FACTS (tell your story *briefly* without citing cases or law): To be proven upon completion of discovery.

Point Four

Counsel failed in his sixth amendment duty. In that he failed to Object to the state['s] argument that a report which was not in evidence that showed the death penalty to be a deterrent to crime.

Point Five

Counsel failed in his sixth amendment duty in that his own arqument [sic] made a direct refference [sic] to appellant failed [sic] to testify.

Point Six

Counsel failed in his sixth amendment duty in both the guilt and pushment [sic] phaseo [sic] of his trial because counsel['s] inexperience manifested itself in that he counducted [sic] only the most cursory and ineffective cross examination of a handful of state witnesses[.]

Point Seven

Counsel failed in his sixth amendment duty in that he failed to test the eyewitnesses indentification [sic] or point out the inadequaces [sic] in the witnesses[']] description of the cars involved[.]

Point Eight

Counsel failed in his sixth amendment duty in that he failed to adequatlyt [sic] to develop the evidence militating against a finding of deliberation.

Point Nine

Counsel failed in his sixth amendment duty in that he made a perfunctory and futile closing argument.

Point Ten

Counsel failed in his sixth amendment duty in failing to object to victoms [sic] widow['s] testimoney [sic] that the decessed [sic] had to [sic] childern [sic].

Point Eleven

Counsel failed in his sixth amendment duty in that he failed to object to the testimoney [sic] of seventeen handguns.

Point Twelve

Counsel failed in his sixth amendment duty in that counsel failed to petition the trial court to fully and correctly instruct the jury on all lessor [sic] included offenses of the crime of captal [sic] murder[,] i.e.[,] First degree felony murder win [sic] instruction was clearly supported by the evidence.

Point Thirteen

Counsel failed in his sixth amendment duty for failing to object to the state['s] presenting evidence of other crimes that appellant was allegedly involved in. On the grounds that said

evidence denied appellant due process and equal protection of the law.

Point Fourteen

Counsel failed in the his sixth amendment duty for failing to petition the court to read M A I- C R 2d 3.60 to fully and correctly instruct the jury as to the use the jury could make of the evidence of other crimes that movant was allegedly involved in.

Point Fifteen

Counsel could not have been competent in represention [sic] of appellant. In that he had only been licensed to practice law for approximately six month[s,] had never tried a muder [sic] case[,] let alone a case where the death penalty was being sought[,] and did not have a secound [sic] attorney to assist him with the difficult aspects of a capital murder trial.

Point Sixteen

Failer [sic] of the Butlar [sic] County Circuit Court to comply with rule 27.26 (i) to make specific findings of fact and conclusions of law.

Point SEventeen [sic]

The prosection [sic] Violated appellant['s] Sixth and Eighth Amendment rights in that he made arquement [sic] about a report that was not in evidence THat [sic] the death penalty was a deterrent to crime.

Point Eighteen

The appellant [sic] court opinion that defense counsel['s] refrence [sic] to

appellant['s] not testifing [sic] is tolerable or nonprejudicial Sec. 546.270[,] R.S.Mo. Rule 27.05 No attorney Including defense counsel is to comment on the defendant[']s failure to testify. It raises a constitutional issue of considerable importance under the fifth amendment and the Article I,Sec. [sic] 19 of the Mo. Constitution.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: N/A

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

    Yes [_] No. [X]

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

    (a) At preliminary hearing: Perry Rhew

    (b) At arraignment and plea: Perry Rhew

    (c) At trial: Perry Rhew

    (d) At sentencing: Perry Rhew

    (e) On appeal: C.J. Larkin

    (f) In any post-conviction proceeding: Gary Robbins[,] Office of the public defender[,] thirty[-]second judicial circuit[,] courthouse[,] Jackson[,] Missouri 63755

(g) On appeal from any adverse ruling in a post-conviction proceeding: Henry E. Robertson[,] Municipal courts Bldg.[,] Room 62[,] 1320 Market Street[,] St[.] Louis[,] MO. 63103

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes [X] No. [_]

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes [X] No. [_]

(a) Of so, give name and location of court which imposed sentence to be served in the future: Butlar [sic] county

(b) Give date and length of the above sentence: Seven lifes and seven years to run consectively [sic].

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes [X] No. [_]

Subscribed and sworn to before me NOV 22 1988

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in his proceeding.

Oscar D. Dunbar
Notary Public, State of
Missouri
Cole County
My commission expires
July 22, 1991

X Kenneth Lee Kenley

I declare under penalty of perjury that the foregoing is true and correct. Executed on _____ (date)

Kenneth Lee Kenley
Signature of Petitioner

91-483

Supreme Court, U.S.
FILED
SEP 23 1991
OFFICE OF THE CLERK

No. 91-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PAUL DELO, Superintendent,
Potosi Correctional Center,

Petitioner,

vs.

KENNETH L. KENLEY,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Volume III

WILLIAM L. WEBSTER
Attorney General

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Attorneys for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

PAUL DELO, Superintendent, Potosi Correctional Center, Petitioner, vs. KENNETH L. KENLEY, Respondent.	)	No. 91-_____

INDEX TO PETITIONER'S APPENDIX

Volume III

13. "Amended Petition for Habeas Corpus," A-238
No. 88-2298-C-3, United States District Court for the Eastern District of Missouri, Eastern Division, **Kenneth L. Kenley v. Bill M. Armontrout**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DISTRICT

KENNETH L. KENLEY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No 88-2298-C-3
	)	
BILL M. ARMONTROUT,	)	
	)	
Respondent.	)	

AMENDED PETITION FOR HABEAS CORPUS

Comes now petitioner Kenneth L. Kenley, by and through counsel[,] and files his Amended Petition for Habeas Corpus.

Introduction

Kenneth L. Kenley was convicted in two separate trials; in the first trial he was convicted of capital murder and in the second of three counts robbery 1st degree, two counts of kidnapping, two counts assault 1st degree and one count stealing a motor vehicle. In each trial, the petitioner was represented by Mr. Perry Rhew, Esq. In each trial, the state was represented by Mr. Mark A. Kennedy, Esq. The

Honorable John C. Holstein presided over both trials, and imposed sentence upon petitioner in both cases.

The instructions for filing a Petition for Writ of Habeas Corpus Corpus [sic] by a Person in State Custody state, in part: "(5) Only judgments entered by one court may be challenged in a single motion." As Judge Holstein entered judgments in both cases, petitioner's grounds for relief in both trials are included in a single motion. For the sake of clarity, however, petitioner's allegations with respect to the capital murder conviction are set out and included herein as Amended Petition and petitioner's allegations with respect to the remaining convictions are set out and included herein as Amended Petition A.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
_____ DIVISION

PETITION

1. Name the location of court which entered the judgment of conviction under attack: Thirty-Six Judicial Circuit, Poplar Bluff, Butler County, Missouri, Hon. J. Holstein

2. Date of judgment of conviction: verdicts June 15, 1984; sentencing July 13, 1984

3. Length of sentence: Death

4. Nature of offense involved (all counts): Capital Murder

5. What was your plea? (Check one)

   (a) Not guilty [X]
   (b) Guilty [_]
   (c) Nolo Contendere [_]

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____

6. Kind of trial: (Check one)

   (a) Jury [X]
   (b) Judge only [_]

7. Did you testify **at the trial?**

   Yes [_] No. [X]

8. Did you appeal from the judgment of conviction?

   Yes [X] No. [_]

9. If you did appeal, answer the following:

(a) Name of court: Missouri Supreme Court
(b) Result: Judgment of conviction and sentence affirmed
(c) Date of result: June 25, 1985, rehearing denied August 7, 1985[,] 693 S.W.2d 79 (Mo. banc 1985)
(d) Grounds raised: Other crimes evidence, murder for money aggravating circumstances, death qualified jury, sentence excessive
(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:
(1) Name of court: _____
(2) Result: _____
(3) Date of result and citation, if known: _____
(4) Grounds raised: _____
(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:
(1) Name of court: United States Supreme Court
(2) Result: certiorari denied
(3) Date of result and citation, if known: March 31, 1986; 475 U.S. 1098, 106 S.Ct. 1500, 89 L.Ed.2d 900
(4) Grounds raised: excessive sentence

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to the judgment in any court, state or federal? Yes [X] No. [_]

11. If your answer to 10 was "yes," give the

following information:

(a) (1) Name of court: Thirty-sixth Judicial Circuit, Butler County, Missouri

(2) Nature of proceeding: Motion for Post-Conviction Relief, Rule 27.26 M.R.Cr.P.

(3) Grounds raised: Ineffective assistance of counsel

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes [X] No. [_]

(5) Result: Post-conviction relief denied

(6) Date of result: December 2, 1986

(b) As to any second petition, application or motion[,] give the same information:

(1) Name of court: _____
(2) Nature of proceeding: _____
(3) Grounds raised: _____
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes [_] No. [_]
(5) Result: _____
(6) Date of result: _____

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc.
Yes [XX] No. [_]
(2) Second petition, etc.
Yes [_] No. [_]

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* tne *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional

grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to his conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of

the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: See attached pages

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

_____

B. Ground two: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

_____

C. Ground three: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

_____

D. Ground four: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

_____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: _____

14. Do you have any petition or appeal now pending in any court, either state or

federal, as to the judgment under attack?

Yes [_] No. [XX]

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: Perry Rhew, Office of the Prosecuting Attorney, P.O. Box 864, Kennett, Missouri 63857

(b) At arraignment and plea: Mr. Perry Rhew

(c) At trial: Mr. Perry Rhew

(d) At sentencing: Mr. Perry Rhew

(e) On appeal: Ms. C.J. Larkin, 209 B East Green Meadows, Columbia, Missouri 65203

(f) In any post-conviction proceeding: Mr. Gary Robbins, Office of the Public Defender, Courthouse, Jackson, Missouri 63755

(g) On appeal from any adverse ruling in a post-conviction proceeding: Mr. Henry B. Robertson, 1320 Market St., Room 62, St. Louis, Missouri 63103

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes [X] No. [_]

17. Do you have any future sentence to serve after you complete the sentence imposed by

the judgment under attack?

Yes [X] No. [_]

(a) Of so, give name and location of court which imposed sentence to be served in the future: Thirty-sixth Judicial Circuit, Poplar Bluff, Butler County, Mo.[,] Hon. J. Holstein

(b) Give date and length of the above sentence: January 14, 1985; seven life terms plus seven years, all consecutive, Consecutive to death sentence.

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes [XX] No. [_]

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in his proceeding.

Thomas J. Cotter
Signature of Attorney (if any)

Mary C. Kickham

I declare under penalty of perjury that the foregoing is true and correct. Executed on 12-7-88
(date)

Kenneth Lee Kenley
Signature of Petitioner

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DISTRICT

KENNETH L. KENLEY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No 88-2298-C-3
	)	
BILL M. ARMONTROUT,	)	
	)	
Respondent.	)	

GROUNDS UPON WHICH PETITIONER IS BEING HELD UNLAWFULLY - CAPITAL MURDER CONVICTION

Petitioner's rights guaranteed by the Fourth, Fifth, Sixth, Seventh, Eighth and Fourteenth Amendments were violated on the following grounds:

1. That trial counsel was ineffective at the punishment stage of petitioner's capital murder trial in that he failed to present any mitigating evidence on petitioner's behalf other than to read a stipulation of defendant's age.

2. That trial counsel was ineffective at the punishment stage of petitioner's capital murder trial in that he failed to present the

medical, psychological and psychiatric testimony and reports of psychiatric social worker, Louis Crownover, and child psychiatrist, Dr. Maria Manion, both of whom previously treated petitioner.

3. That trial counsel was ineffective in that he failed to challenge the psychiatric report prepared by Dr. Parwatikar in that it did not contain any reference to the reports prepared by Louis Crownover and Dr. Maria Manion, when counsel knew said reports had been provided to Dr. Parwatikar.

4. That trial counsel was ineffective in requesting the appointment of petitioner's capital murder, death penalty case, when he knew that he had been employed as an attorney for only three (3) months.

5. That trial counsel was ineffective in proceeding with the litigation of petitioner's capital murder, death penalty case, when he knew that at the time of trial, he had been a

licensed attorney for only nine (9) months, and had tried only one (1) previous jury trial.

6. That trial counsel was ineffective in that knowing of his legal and litigation inexperience, and knowing that the Public Defender of Butler County also had no previous experience in capital cases, he did not contact the Office of the State Public Defender for assistance on petitioner's case.

7. That trial counsel was ineffective in that he failed to request additional psychological and psychiatric evaluations of petitioner.

8. That trial counsel was ineffective in filing a waiver of an automatic change of venue in a highly-publicized case, and in failing to impress upon petitioner the necessity of changing venue.

9. That trial counsel was ineffective in conducting a cursory and ineffectual cross-examination of a handful of state's witnesses. Counsel asked a total of thirty-six (36) questions of twenty-six (26) state's witnesses.

10. That trial counsel was ineffective in failing to challenge the eyewitness identifications as presented by the state's witnesses.

11. That trial counsel was ineffective in failing to point out and argue inadequacies in the descriptions of various vehicles involved as presented by the state's witnesses.

12. That trial counsel was ineffective in failing to develop evidence militating against deliberation.

13. That trial counsel was ineffective in delivering a futile and perfunctory closing argument.

14. That trial counsel was ineffective in failing to object to the testimony of the decedent's widow, during the guilt/innocence stage of the trial, that the decedent had two children.

15. That trial counsel was ineffective in failing to object to testimony regarding numerous unrelated handguns in possession of petitioner.

16. That trial counsel was ineffective in failing to object to "other crimes evidence", in spite of the fact that th3e trial Court advised counsel when it was the appropriate time to object to said evidence.

17. That trial counsel was ineffective during voir dire in failing to question the jury panel on their views about the presumption of innocence and burden of proof.

18. That trial counsel was ineffective during voir dire in failing to question the jury panel whether they would automatically impose a sentence of death after finding of capital murder, i.e., trial counsel failed to "reverse Witherspoon".

19. That trial counsel was ineffective in failing to request the trial Court to "instruct down", i.e., to instruct the jury on all lessor [sic] included offenses supported by the evidence, to wit: first and second degree felony murder, and manslaughter.

20. The trial counsel was ineffective during the punishment stage of the trial in failing to submit and argue as a mitigating factor that petitioner had no significant history of prior criminal activity.

21. That trial counsel was ineffective in failing to give an opening statement in either stage of the trial[.]

22. That trial counsel was ineffective during voir dire in failing to attempt to rehabilitate jury panel members who had been disqualified as opponents of the death penalty.

23. That trial counsel was ineffective in that during the punishment stage of the trial, he failed to object to the prosecutor's argument which referred to a report which the prosecutor had read which indicated the death penalty was a deterrent to crime. Said report had not been admitted into evidence.

24. That trial counsel was ineffective in that he failed to request that the trial Court

poll the jurors after their return of a capital murder verdict.

25. That trial counsel was ineffective in that during his own closing argument in the punishment stage of the trial, he made a direct reference to petitioner's failure to testify.

26. That trial counsel was ineffective in failing to investigate the State's plea negotiations with state's witness Mr. Peal.

27. That trial counsel was ineffective in that he failed to investigate possible mitigating evidence at the punishment stage, and he failed to contact petitioner's relatives and friends regarding their testimony at the punishment stage.

28. That trial counsel was ineffective in that he failed to move for the exclusion of State's witness, Phyllis Felts, after learning that she was present in the courtroom during voir dire examination.

29. That trial counsel was ineffective in that he failed to move for the striking of the

testimony of the pathologist and the pathologist's report when it was discovered that the State had failed to comply with the rules of discovery by not providing defense counsel with a copy of the pathologist's report prior to trial.

30. That trial counsel failed to properly investigate the circumstances of Stat's witness, Lawrence Peal's, [sic] arrest in which he allegedly denied any knowledge of petitioner's possession of numerous handguns.

31. That trial counsel was ineffective in not requesting a mistrial, or in the alternative, not questioning a juror, when it was brought to the Court's attention in mid-trial that a juror may have known or been a neighbor of petitioner's mother. Trial counsel apparently relied on the word of a deputy sheriff that this revelation would have no bearing on the juror's ability to render a fair and impartial verdict.

32. That trial counsel was ineffective in failing to develop any theory of defense either in the presentation of evidence or in cross-examination of the State's evidence.

33. That trial counsel was ineffective in failing to investigate, obtain, review, and possibly present to the jury in the punishment stage of the trial, the facts and circumstances surrounding petitioner's prior admission to Farmington State Hospital.

34. That the cumulative effect of trial counsel's errors, as aforesaid, deprived petitioner of the right to effective assistance of counsel and the right to a fair trial in both the guilt/innocence stage and the punishment stage.

35. That the imposition of the death penalty against petitioner constitutes cruel and unusual punishment in violation of the rights secured by the Eighth Amendment of the United States Constitution and Article I, Section 21 of the Missouri Constitution; that the sentence of

death was imposed under the influence of passion, prejudice and other arbitrary factors; that the evidence adduced does not support the jury's finding of a statutory circumstance as enumerated in Subsection 2 of Section 565.032[,] R.S.Mo. 1983[,] and any other circumstance found; and the sentence of death imposed herein is excessive and disproportionate to the penalty imposed in similar cases, considering the crime, the strength of the evidence and the defendant.

PRAYER FOR RELIEF

WHEREFORE, the premises considered, petitioner prays for the following relief:

1. That this Court hold the sentence of death imposed upon petitioner and the conviction on which that sentence rests void and of no effect;

2. That the Court issue a writ of habeas corpus to have petitioner brought before it to the end that he may be discharged from his unconstitutional confinement and restraint and/or

relieved from his unconstitutional sentence of death;

3. That the Court conduct an evidentiary hearing at which evidence may be adduced to support the allegations contained in petitioner's Amended Petition;

4. That the Court enter an Order, pursuant to Rule 6 of the rules governing Title 28 U.S.C. Section 2254, that petitioner be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure;

5. That the Court stay petitioner's execution pending final disposition of the Amended Petition, pursuant to Title 28 U.S.C. Section 2251. Said execution is presently scheduled for 12:01 a.m. on January 31, 1989; and

7. That the Court grant such other relief as may be appropriate.

Respectfully submitted,

Thomas C. Cotter

Thomas C. Cotter
100 North Broadway,

Suite 1600
St. Louis, Missouri 63102

OF COUNSEL:

ARMSTRONG, TEASDALE
KRAMER, VAUGHN &
SCHLAFLY

Mary C. Kickham
Mary C. Kickham
611 Olive Street,
Suite 1900
St. Louis, Missouri 63101
(314) 621-5070

ATTORNEYS FOR PETITIONER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
_____ DIVISION

AMENDED PETITION - A

1. Name the location of court which entered the judgment of conviction under attack: Thirty-Sixth Judicial Circuit, Poplar Bluff, Butler County, Missouri, Hon. J. Holstein

2. Date of judgment of conviction: verdict November 14, 1984; sentencing January 14, 1985

3. Length of sentence: Seven life terms plus seven years, all consecutive. Consecutive to death sentence.

4. Nature of offense involved (all counts): Three counts robbery 1st degree, two counts kidnapping, 2 counts assault 1st degree, one count stealing a motor vehicle.

5. What was your plea? (Check one)

   (a) Not guilty [X]
   (b) Guilty [_]
   (c) Nolo Contendere [_]

If ~~you~~ entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____

6. Kind of trial: (Check one)

   (a) Jury [X]
   (b) Judge only [_]

7. Did you testify at the trial?

   Yes [_] No. [X]

8. Did you appeal from the judgment of conviction?

Yes [X] No. [_]

9. If you did appeal, answer the following:

(a) Name of court: Missouri Court of Appeals, Southern District Court
(b) Result: Judgment of conviction and sentence affirmed
(c) Date of result: November 26, 1985; 701 S.W.2d 185 (Mo.App. 1985)
(d) Grounds raised: Other crimes evidence, ineffective assistance of counsel
(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:
(1) Name of court: _____
(2) Result: _____
(3) Date of result and citation, if known: _____
(4) Grounds raised: _____
(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:
(1) Name of court: _____
(2) Result: _____
(3) Date of result and citation, if known: _____
(4) Grounds raised: _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to the judgment in any court, state or federal? Yes [X] No. [_]

11. If your answer to 10 was "yes," give the

following information:

(a) (1) Name of court: Thirty-sixth Judicial Circuit, Butler County, Missouri

(2) Nature of proceeding: Motion for Post-Conviction Relief, Rule 27.26 M.R.Cr.P.

(3) Grounds raised: Ineffective assistance of counsel

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes [X] No. [_]

(5) Result: Post-conviction relief denied

(6) Date of result: December 2, 1986

(b) As to any second petition, application or motion[,] give the same information:

(1) Name of court: _____
(2) Nature of proceeding: _____
(3) Grounds raised: _____
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes [_] No. [_]
(5) Result: _____
(6) Date of result: _____

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc.
Yes [X] No. [_]
(2) Second petition, etc.
Yes [_] No. [_]

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional

grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to his conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double

jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: See attached pages

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

_____

B. Ground two: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

_____

C. Ground three: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

_____

D. Ground four: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

_____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: _____

14. Do you have any petition or appeal now pending in any court, either state or

federal, as to the judgment under attack?

Yes [_] No. [XX]

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: Mr. Perry Rhew, Office of the Prosecuting Attorney, P.O. Box 864, Kennett, Missouri 63857

(b) At arraignment and plea: Mr. Perry Rhew

(c) At trial: Mr. Perry Rhew

(d) At sentencing: Mr. Perry Rhew

(e) On appeal: Ms. C.J. Larkin, 209 B East Green Meadows Road, Columbia, Missouri 65203

(f) In any post-conviction proceeding: Mr. Gary Robbins, Office of the Public Defender, Courthouse, Jackson, Missouri 63755

(g) On appeal from any adverse ruling in a post-conviction proceeding: Mr. Henry B. Robertson, 1320 Market St., Room 62, St. Louis, Missouri 63103

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes [_] No. [X]

17. Do you have any future sentence to serve

after you complete the sentence imposed by the judgment under attack?

Yes [_] No. [_]

(a) Of so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of the above sentence: Previously received death penalty for capital murder conviction, which is subject of first part of this amended petition.

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes [_] No. [_]

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in his proceeding.

Thomas J. Cotter
Signature of Attorney (if any)

Mary C. Kickham

I declare under penalty of perjury that the foregoing is true and correct. Executed on 12-7-88
(date)

Kenneth Lee Kenley
Signature of Petitioner

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DISTRICT

KENNETH L. KENLEY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No 88-2298-C-3
	)	
BILL M. ARMONTROUT,	)	
	)	
Respondent.	)	

GROUNDS UPON WHICH PETITIONER IS BEING HELD UNLAWFULLY - ROBBERY, KIDNAPPING, ASSAULT AND STEALING CONVICTIONS

Petitioner's rights guaranteed by the Fourth, Fifth, Sixth, Seventh, Eighth and Fourteenth Amendments were violated on the following grounds:

1. That trial counsel was ineffective in that he failed to request a severance of the charges arising out of incidents at the Kater Inn, the Blue Moon, and the Coachlight Motel. Each incident constituted a separate transaction, not linked by a common scheme or plan, each set of offenses was unnecessary to prove the others, and petitioner was prejudiced by

having the evidence of each transaction impermissibly bolstered by the evidence of the others.

2. That trial counsel was ineffective in that he conducted a totally meaningless voir dire consisting of six questions, which failed to include the jury panel's understanding of the presumption of innocence, burden of proof, the effect of the defendant's failure to testify and the ranges of punishment.

3. That the trial counsel was ineffective in failing to develop any theory of defense either in the presentation of evidence or in cross-examination of the state's witnesses.

4. That trial counsel was ineffective in that of the seventeen state witnesses, on cross-examination, counsel asked one question of one witness.

5. That trial counsel was ineffective in failing to object to numerous inadmissible hearsay statements, and other inadmissible evidence.

6. That trial counsel was ineffective in not requiring the trial Court to read MAI-CR2d 1.08 to the jury before each trial adjournment and recess.

7. That trial counsel was ineffective in that he failed to submit and request MAI-CR2d 3.60, which would have instructed the jury to limit their consideration of substantial evidence of other crimes.

8. That trial counsel was ineffective because he failed to submit and request any instructions be read to the jury on petitioner's behalf.

9. [T]hat trial counsel was ineffective in waiving closing argument.

10. That the acts and omissions of trial counsel amounted to the functional equivalent of a guilty plea. The record is devoid of any indication that petitioner knowingly and voluntarily waived his right to a jury trial.

11. That trial counsel was ineffective, and failed to avoid the appearance of

impropriety in appearing on behalf of petitioner at petitioner's sentencing when at the time, trial counsel was employed as an Assistant Prosecuting Attorney.

12. That the cumulative effect of trial counsel's errors, as aforesaid, deprived petitioner of the right to effective assistance of counsel and the right to a fair trial.

PRAYER FOR RELIEF

WHEREFORE, the premises considered, petitioner prays for the following relief:

1. That the Court issue a writ of habeas corpus to have petitioner brought before it to the end that he may be discharged from his unconstitutional confinement and restraint;

2. That the Court conduct an evidentiary hearing at which evidence may be adduced to support the allegations contained in petitioner's Amended Petition;

3. That the Court enter an Order, pursuant to Rule 6 of the rules governing Title 28 U.S.C. Section 2254, that petitioner be entitled

to invoke the processes of discovery available under the [F]ederal Rules of Civil Procedure;

4. That the Court enter an Order authorizing the prepayment to petitioner's counsel reasonable expense monies so that discovery may commence; and

5. That the Court stay petitioner's execution pending final disposition of the amended Petition, pursuant to Title 28 U.S.C. Section 2251. Said execution is presently scheduled for 12:01 a.m. on January 31, 1989; and

6. That the Court grant such other relief as may be appropriate.

Respectfully submitted,

Thomas C. Cotter
Thomas C. Cotter
100 North Broadway,
Suite 1600
St. Louis, Missouri 63102

OF COUNSEL:

ARMSTRONG, TEASDALE
KRAMER, VAUGHN &
SCHLAFLY

Mary C. Kickham
Mary C. Kickham
611 Olive Street,
Suite 1900
St. Louis, Missouri 63101
(314) 621-5070

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed, first class postage prepaid, on this 23rd day of December, 1988 to: William Webster, Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

Mary C. Kickham

ORIGINAL

(3)

No. 91-483

Supreme Court, U.S.
FILED
OCT 16 1991
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PAUL DELO, Superintendent,
Potosi Correctional Center,

Petitioner,

v.

KENNETH L. KENLEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

THIS COURT SHOULD NOT GRANT CERTIORARI HEREIN, BECAUSE THIS CASE PRESENTS NO SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO EXERCISE ITS DISCRETIONARY JURISDICTION.

II.

THE COURTS OF APPEAL MUST APPLY THE GUIDELINES OF STRICKLAND v. WASHINGTON TO THE FACTS AND CIRCUMSTANCES OF EACH INDIVIDUAL CASE TO DETERMINE EFFECTIVENESS OF COUNSEL.

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IN THE
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No. 91-483

PAUL DELO, Superintendent,
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STATEMENT OF THE CASE

Respondent is compelled to correct and clarify Petitioner's Statement of the Case by adding facts omitted by Petitioner. This case is fact intensive and specific, involving a new lawyer who completely failed to investigate mitigating evidence and failed to present mitigating evidence in the death penalty phase of Respondent's trial. Petitioner's rendition of the facts of Respondent's three hour crime spree is a transparent attempt to garner sympathy for his position, and has no place in a Petition

for Writ of Certiorari. It is not surprising that once again Petitioner declines to focus on trial counsel's representation of Respondent. At the time of his appointment to this capital case, trial counsel was a new county public defender, just three months out of law school with no trial experience. The capital trial occurred six months after appointment when counsel had tried one burglary case. The Eighth Circuit aptly summarized trial counsel's abysmal performance during the guilt phase of the capital trial and the noncapital trial and trial counsel's constitutionally deficient performance in the sentencing phase of the capital trial as follows:

> Prior to the capital trial, counsel waived an automatic change of venue despite the wide publicity Kenley's crimes had received. During voir dire, counsel performed little inquiry into the attitudes of the jurors toward capital punishment and into jurors' ability to consider a range of possible punishments. Counsel waived opening statement and only asked thirty-six cross-examination questions of eight out of twenty-six witnesses. Counsel did not challenge somewhat inaccurate descriptions of Kenley and his vehicle, did not challenge ambiguities and inconsistencies in witness statements, and did not object to a surprise pathologist's report. Counsel also did not object to the admission of cumulative and potentially prejudicial testimonial evidence regarding Kenley's identity, the victim's family, and other weapons unrelated to the crime. Counsel made a short, unremarkable closing argument and submitted no jury instructions. Capital murder, second degree murder and manslaughter instructions were given by the court.
>
> At the capital sentencing, counsel submitted no mitigating evidence although Kenley's age was stipulated and the prosecution introduced Kenley's single prior conviction. Counsel unwittingly made reference to Kenley's failure to testify and did not object to evidence regarding the deterrent effect of the death penalty introduced by the prosecution. Many similar events occurred (or failed to occur) at Kenley's noncapital trial. In

> addition, counsel made no closing argument and did not move for severance of charges (robbery, kidnapping, assault and theft). By the close of the noncapital trial, counsel had accepted a job with the prosecuting attorney's office.

Kenley v. Armontrout, 937 F.2d 1298, 1300-1301 (8th Cir. 1991).

The undivided panel's twenty-four page opinion is a well-reasoned, well-written discourse of Respondent's claims of failure to investigate and failure to present mitigating evidence in the state court. The Eighth Circuit's opinion also demonstrates the prejudice suffered by Respondent in the sentencing stage of his capital trial by trial counsel's ineffective performance.

ARGUMENT

I. This Court Should Not Grant Certiorari Herein, Because This Case Presents No Special And Important Reasons For This Court To Exercise Its Discretionary Jurisdiction.

Petitioner clearly has not demonstrated that the opinion of the panel warrants certiorari. Rule 10.1, Rules of the United States Supreme Court, clearly provides that this Court's certiorari review is discretionary, and should be exercised "only when there are special and important reasons therefor." Rule 10.1, Rules of the Supreme Court of the United States. The purpose of the writ of certiorari is not to correct possible errors made by federal courts of appeal. This Court has held:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is real and embarrassing conflict of opinion and authority between the circuit courts of appeals.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, 43 S.Ct. 422, 423, 67 L.Ed. 712 (1923). Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79, 75 S.Ct. 614, 99 L.Ed. 897 (1955).

Petitioner has not shown, nor even alleged, that special and important reasons exist for this Court to exercise its jurisdiction. Moreover, Petitioner almost concedes that this case does not meet the standards of Rule 10. This case does not involve a conflict between the circuits or a question of an unsettled principle of federal law. Instead, Petitioner argues that this Court should grant certiorari to deter misconduct by the federal Courts of Appeals that erroneously apply existing federal law. Petition at 11. In support of this argument, Petitioner cites Burden v. Zant, ___ U.S. ___, 111 S.Ct. 862, 112 L.Ed.2d 962 (1991); Sumner v. Mata, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982); and Duckworth v. Serrano, 454 U.S. 1, 102 S.Ct. 18, 70 L.Ed.2d 1 (1981).

Each of the three cases cited by Petitioner involve the blatant failure by the lower courts to follow the clear dictates of federal statutes. In Burden and Sumner, the lower courts disregarded the presumption of correctness doctrine embodied in 2254(d) without citing any authority or any discussion of the application of any exception as required in that statute. In Duckworth, the lower court disregarded the exhaustion requirement without citing any authority or any established legal exception that would excuse the failure to exhaust in that case. In contrast, in Respondent's case, the Eighth Circuit clearly

followed the Strickland cause and prejudice analysis and merely applied it to the facts of Respondent's case. It, therefore, would stretch the imagination to compare what the Eighth Circuit did in Kenley with the three previously mentioned cases.

Petitioner next argues that the purpose of federal habeas corpus is to deter state court misconduct in interpreting federal constitutional law, citing Teague v. Lane, 489 U.S. 288, 306, 109 S.Ct. 1060, 1072-1073, 103 L.Ed.2d 334 (1989), and tries to extend the purpose of the writ of certiorari to include deterring misconduct of the federal courts citing no authority. Petitioner quotes Teague v. Lane out of context. The passages out of Teague regarding deterrence of state court misconduct embody Justice Harlan's view that retroactive application of new constitutional laws undermine the state court's role in applying the law as it existed at the time of a litigant's trial and state appeals. Justice Harlan is quoted in Teague as follows:

> The threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards. In order to perform this deterrence function, . . . the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place.

Teague v. Lane, 489 U.S. 288, 306, 109 S.Ct. 1060, 1073, 103 L.Ed.2d 334 (1989).

What is meant by "deterrence," as mentioned in Teague and quoted by Petitioner, is that the state courts properly follow and apply existing federal constitutional law during state proceedings. There is no requirement that a federal court

specifically find misconduct on the part of the state courts to justify habeas relief.

Petitioner further argues that because there is no allegation of state court misconduct in Kenley's case and because Kenley had a hearing on these issues in state court, this case is beyond the scope of federal habeas relief. Petitioner's argument is inconsistent with the plain language of 28 U.S.C. § 2254, which provides that a federal court "shall entertain an application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States." Therefore, Petitioner's argument is clearly an attempt to circumvent the plain language of § 2254's provisions on the scope of federal habeas relief. Accordingly, the conclusory statements made by Petitioner do not demonstrate a question of exceptional importance or a conflict between the law of the circuits and this Court should not grant Petitioner's Petition for Writ of Certiorari.

II. The Courts of Appeal Must Apply The Guidelines Of Strickland v. Washington To The Facts And Circumstances Of Each Individual Case To Determine Effectiveness Of Counsel.

The case at bar presents a unique set of circumstances, unlike those in any case cited by Petitioner or Respondent throughout this litigation. Respondent was tried and convicted of capital murder and sentenced to death. His death sentence was set aside by the United States Court of Appeals for the Eighth Circuit.

The bulk of Petitioner's argument is that the Eighth Circuit erroneously applied the cause and prejudice standards of Strickland v. Washington. The Eighth Circuit's decision that Respondent's trial counsel was ineffective simply applied to the facts herein this Court's standards as set out in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court has often pointed out, there is no clear rule as to what constitutes effective or ineffective assistance of counsel. Ineffectiveness in each case must be decided on the basis of its own facts and circumstances. Id. at 688-690. This Court has already set parameters to guide the lower courts in making this determination. Id. These parameters were clearly followed by the Eighth Circuit in Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991) reh. denied Nos. 89-2915, 90-1015 (August 13, 1991), and do not need further clarification by this Court. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). It is difficult to see how the Eighth Circuit's decision in this case could have a broad application or importance beyond the unique factual limits of the case at bar.

A. The Eighth Circuit Properly Applied the Cause Prong of the Strickland Test to the Facts of This Case.

Petitioner argues that the Eighth Circuit failed to give proper deference to the presumption that trial counsel provided effective assistance and avoid the "distorting effect of hindsight." This assertion is totally without merit. At the beginning of its Strickland analysis in the Kenley opinion, the

United States Court of Appeals for the Eighth Circuit quoted language from Strickland:

> With the performance test, we start by presuming that counsel provided effective assistance, and we do not use hindsight to question counsel's performance.

Kenley v. Armontrout, 937 F.2d at 1303 (quoting Strickland v. Washington at p. 687-688). Again, at the conclusion of its Strickland analysis, the Eighth Circuit panel quotes from Strickland as follows:

> The state argues and the district court infers that recent case authority in our circuit does not support the legal conclusions we reach in this case, and suggests that our existing authority creates an almost insurmountable barrier to habeas relief. We disagree with this general characterization of our case authorities although, as a practical matter, the strong presumption in favor of counsel and the heavy burden on the defendant established by the Supreme Court in Strickland means determination of ineffective assistance of counsel such as in the present case will likely occur infrequently.

Kenley v. Armontrout, 937 F.2d at 1309. In light of these specific quotations of Strickland by the Eighth Circuit panel, it is clear that the Eighth Circuit did consider and correctly apply the performance prong of the Strickland test.

The parameters set out in Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984), for measuring the effectiveness of counsel's performance, apply with particular relevance to the instant case.

> Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Strickland v. Washington, 466 U.S. 668, 690-691, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984). Characterizing an act or omission as trial strategy puts the stamp of reasonableness on it, and makes it "virtually unchallengeable." However, it is clearly the intent of Strickland that the question of reasonableness is a legal one. The State of Missouri suggests the federal reviewing court can't make that determination, contrary to Strickland. "Ineffectiveness is not a question of 'basic, primary or historical fact' (citations omitted) . . . it is a mixed question of law and fact." Strickland v. Washington, supra, at 689. Petitioner states that the Court of Appeals did not find misconduct by the state court. Petition for Writ at p. 13. The Eighth Circuit properly disagreed. Kenley, 937 F.2d at 1308.

Moreover, the record of the state proceedings on Respondent's 27.26 motion did not fairly support the state court's determination that trial counsel's decision not to present mitigating evidence was trial strategy. The record was limited to the consideration of the evidence Dr. Manion and Mrs. Crownover could have presented. No consideration was given to the other mitigating evidence that was available. The court did not take into account psychiatric evidence from the military, nor did trial counsel request appointment of a psychiatrist. The state court specifically commented on the fact that there was a conflicting report only three months old which revealed no mental defect which was contrary to the six year old information. See Kenley v. State, 759 S.W.2d 340, 346 (Mo. App. 1988). The Eighth Circuit noted:

> In sum, the state court fact findings were incomplete and counsel's decision to stop investigating was unreasonable because his belief that mitigating evidence was too old and insubstantial resulted from his failure to follow available leads to more recent and persuasive mitigating evidence. Counsel's investigation fell short of what was required in this case.

Kenley, 937 F.2d at 1308.

Each case with an ineffectiveness claim must be judged on its own facts and circumstances. Strickland v. Washington, 466 U.S. 668, 689-690, 104 S.Ct. 2052, 2065-2066, 80 L.Ed.2d 674 (1984). That is precisely what was done in this case. The Eighth Circuit noted:

> Here it was not a reasonable strategy that led counsel not to investigate, but lack of thoroughness and preparation. "Counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made." Chambers, 907 F.2d at 835 (quoting United States v. Gray, 878 F.2d 702, 711 (3rd Cir. 1989)).

Kenley, 937 F.2d at 1308. The United States Court of Appeals for the Eighth Circuit made a determination, pursuant to Strickland, that Respondent's trial counsel limited his investigation in a manner not supported by a reasonable professional judgment. Id. The court makes clear that this decision is unreasonable in view of the unique and cumulative facts of this case. Id.

B. The Eighth Circuit Properly Found Respondent had been Prejudiced.

Petitioner further argues that the Eighth Circuit misapplied the prejudice prong of the Strickland test, however, in the process Petitioner completely misstates the law.

The court clearly and correctly followed Strickland, finding that if evidence had been presented, there is a reasonable

probability that "the result would have been different." Kenley v. Armontrout, 937 F.2d at 1308. Strickland v. Washington, 466 U.S. 668, 694-695, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In discussing the prejudice prong, the Eighth Circuit stated that: "we have demonstrated that the state court fact finding was not supported by the record." Kenley, 937 F.2d at 1308. Ineffective assistance of counsel is a mixed question of law and fact. The Eighth Circuit was not bound by the state court's findings on this issue. See Lawrence v. Armontrout, 900 F.2d 127 (8th Cir. 1990). The Eighth Circuit stated:

> We believe there is a reasonable probability Kenley would not have received a death sentence if some of the mitigating evidence had been presented.

Kenley, 937 F.2d at 1308.

After full briefing and argument and review of the entire record, the Eighth Circuit unanimously concluded that this evidence was mitigating and substantial and that it undermined their confidence in the outcome of the sentencing phase under the proper application of the Strickland test.

> We have demonstrated that the state court fact finding was not supported by the record because the potential mitigating evidence was substantial. We do not agree as a matter of law that there was no prejudice because the other evidence would have significantly worsened the perception of Kenley's character. Rather, we believe the testimony would have put the aggravating evidence in context along with the mitigating evidence.
>
> The state courts' conclusion on this issue was based on counsel's beliefs that the mitigating evidence would be unpersuasive to a jury in light of Dr. Parwatikar's report and additional potentially aggravating information. We do not believe reasonably effective counsel would have reached the same conclusion if, in addition to reviewing Crownover's records, counsel would have interviewed Dr. Manion and Dr. Richards or

> at least reviewed their reports, reviewed Kenley's military file, and interviewed family witnesses concerning Kenley's history and his condition the morning after arrest. This additional information would have been more than enough to mount a challenge to Parwatikar's report . . . Also, Kenley's alcohol problems were well documented by all doctors, and when combined with other evidence from the sheriff, news accounts and family testimony, would have been probative mitigating evidence of intoxication.

Kenley v. Armontrout, 937 F.2d at 1308. Further, Petitioner's disagreement with the unanimous conclusion of the Eighth Circuit panel as to the weight of the mitigating evidence would not justify the Supreme Court's exercise of its discretionary review under a writ of certiorari.

Finally, Petitioner seems to argue that the panel opinion will have an adverse effect on other capital habeas litigation in the Eighth Circuit. Petitioner cites approximately eight cases out of the Eighth Circuit in which the court found ineffective assistance of counsel, purportedly due to the misapplication of the Strickland test. Reading this argument between the lines, Petitioner appears to be arguing that under Kenley that the jailhouse door will be opened and every future capital litigant in the Eighth Circuit is going to be granted relief on their ineffective assistance of counsel claims. This view is incredible in light of the fact that Petitioner can cite only eight cases where habeas litigants have received relief on an ineffective assistance of counsel claim when there are undoubtedly hundreds of cases in the last ten years in which the Eighth Circuit has rejected such claims.

Indeed, Petitioner previously argued that recent case authority in the Eighth Circuit does not support the legal

conclusion reached in this case. The State argued and apparently believes that existing authority creates an almost insurmountable barrier to habeas relief. The Eighth Circuit, however, has found that failure to interview witnesses or discover mitigating evidence relates to trial preparation and not trial strategy. Chambers v. Armontrout, 907 F.2d 825, 828 (8th Cir.) (en banc), cert. denied, 111 S.Ct. 369, 112 L.Ed.2d 331 (1990).

The Eighth Circuit panel was clearly correct in stating that Kenley is an exceptional case involving a rare situation where ineffectiveness can be proven under the Strickland test. Kenley, 937 F.2d at 1309. The undivided panel opinion of the Eighth Circuit is consistent with the opinion of this Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Eighth Circuit's decision is correct and certiorari is unnecessary.

CONCLUSION

The United States Court of Appeals for the Eighth Circuit correctly applied the standards set forth for judging an ineffectiveness claim in Strickland v. Washington to the facts of this case. Petitioner has advanced no compelling reason for certiorari. Respondent respectfully suggests that Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that three true and correct copies of "Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit" in the case of Paul Delo, Superintendent, Potosi Correctional Center v. Kenneth L. Kenley, No. 91-483, were mailed, pursuant to Supreme Court Rule 29.5(b), postage prepaid, this 16th day of October, 1991, to:

William L. Webster, Attorney General
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Twelve copies of the above-referenced Brief were mailed to William Suter, Clerk, United States Supreme Court, pursuant to Supreme Court Rule 39.5, this date, the 16th day of October, 1991.

Thomas J. Cotter

THOMAS J. COTTER